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No. _____

In the Supreme Court of the United States

THE UNIVERSITY OF TEXAS HEALTH SCIENCE CENTER AT SAN ANTONIO,
Petitioner,

v.

THERESA M. SILER-KHODR,
Respondent,

AND

THE UNITED STATES OF AMERICA,
Intervenor-Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Congress validly abrogated the States' Eleventh Amendment immunity under the Equal Pay Act, 29 U.S.C. §206(d).

2. Whether Title VII's prohibition against sex discrimination precludes a state university from hiring a male professor at a higher salary than a similarly situated female professor already employed by the university.

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On Petition for Writ of Certiorari to the
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PETITION FOR WRIT OF CERTIORARI

In upholding Congress's attempted abrogation of the States' Eleventh Amendment immunity under the Equal Pay Act, the Fifth Circuit undermined this Court's precedents in two important ways. First, it erroneously allowed Congress to abrogate the States' sovereign immunity through legislation that was clearly passed pursuant to Congress's Commerce Clause power; and, second, it created an exception to the congruence-and-proportionality test for statutes designed to remedy sex discrimination. The Fifth Circuit's decision conflicts with this Court's Eleventh Amendment jurisprudence in a manner that compromises the States' inherent right of sovereignty. Accordingly, the Court should grant the petition for writ of certiorari. *See* SUP. CT. R. 10(c).

CITATION OF OPINIONS

The Fifth Circuit's opinion is reported at 261 F.3d 542 (CA5 2001). App., at 1a-27a. The opinion denying the University's petition for rehearing en banc is reported at 292 F.3d 221 (CA5 2002). App., at 28a-37a. The district court's final judgment on the merits is unreported. App., at 38a-43a.

BASIS FOR JURISDICTION

The Fifth Circuit delivered its judgment and opinion on August 24, 2001, and denied the University's petition for rehearing en banc on May 16, 2002. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the Constitution provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

The relevant provisions of the Fourteenth Amendment to the United States Constitution provide:

> "Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> . . .

> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, §§1, 5.

The relevant portion of Title VII provides:

> Employer practices
>
> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin." 42 U.S.C. §2000e-2.

The Equal Pay Act, 29 U.S.C. §206(d), and the other pertinent provisions of Fair Labor Standards Act, 29 U.S.C. §§201-219, are included in the Appendix.

STATEMENT OF THE CASE

Theresa M. Siler-Khodr, Ph.D., a reproductive endocrinologist specializing in the area of hormones involved with the female reproductive system, began her employment with the University of Texas Health Science Center at San Antonio in 1976 at a salary of $25,000. In 1997, Dr. Siler-Khodr sued the University in state court, alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2, the Americans with Disabilities Act, 42 U.S.C. §12101, the Equal Pay Act (EPA), 29 U.S.C. §206(d), and

various Texas statutes. The University removed the suit to federal court.[1]

As relevant to this petition, Dr. Siler-Khodr claimed that the University paid her a discriminatory salary based on her sex. Her complaint alleged that, in 1989, the University hired Dr. Sydney Shain, a male reproductive endocrinologist who studies the male reproductive system, and paid him $83,000—which exceeded her 1989 salary of $64,354. It was undisputed that the University's offer to Dr. Shain of $83,000 was only $3,000 more than he was earning at his previous employment and that he would not have accepted employment with the University for less than $80,000. It was also undisputed that since her initial hire in 1976, Dr. Siler-Khodr received regular merit raises and state-mandated pay increases and, prior to Dr. Shain's being hired, had never complained that her salary was affected by discrimination.

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1. The Court recently held in *Lapides v. Board of Regents of the University System of Georgia* that a State waives its Eleventh Amendment immunity when it removes a suit containing state-law claims for which sovereign immunity has been waived in state court. 122 S.Ct. 1640 (2002). Although the University removed this case to federal court, *Lapides* is not applicable for two reasons: (1) this case does not involve state-law claims for which sovereign immunity has been waived; and (2) Dr. Siler-Khodr did not assert waiver once the University raised its Eleventh Amendment immunity in the Fifth Circuit. Thus, Dr. Siler-Khodr waived any conceivable waiver-by-removal argument by not preserving it in the Fifth Circuit. *See Martinez v. Tex. Dep't of Criminal Justice*, ___F.3d___, No. 00-51135, 2002 WL 1721803, at *6 (CA5 July 25, 2002) (holding that *Lapides* did not constitute such an unforeseen legal rule that the plaintiff should be excused from preserving any waiver-by-removal argument).

Prior to trial, the district court dismissed all of Dr. Siler-Khodr's claims except those for sex discrimination and retaliation under Title VII and for unequal pay under the Equal Pay Act. The case was tried to a jury, which returned a verdict for Dr. Siler-Khodr on her sex discrimination and unequal pay claims, but found in favor of the University on her retaliation claim. The district court entered final judgment on the jury's verdict. App., at 38a-43a. The court awarded Dr. Siler-Khodr back pay of $91,000 and compensatory damages of $20,000. App., at 41a. It also ordered the University to equalize Dr. Siler-Khodr's compensation to that of Dr. Shain and to pay her all sums necessary to accomplish that equalization retroactive to the day the jury made its findings. *Id.* The court further awarded an additional $91,000 in liquidated damages under the Equal Pay Act and attorneys' fees under Title VII.[2] App., at 42a-43a.

The University appealed to the Fifth Circuit, asserting Eleventh Amendment immunity as to the Equal Pay Act claim and contesting the evidentiary sufficiency of the jury's verdict under Title VII. A divided panel of the Fifth Circuit affirmed. App., at 1a. The majority held that the evidence was sufficient to support the jury's Title VII verdict and that the Equal Pay Act validly abrogated the States' Eleventh Amendment immunity under §5 of the Fourteenth Amendment. App., at 1a-15a. Judge DeMoss dissented regarding the court's EPA holding. App., at 15a-24a. In his view, Congress applied the EPA to the States in 1974 solely under its Commerce Clause power, and, therefore, Congress's attempted abrogation of the States' Eleventh Amendment immunity under the EPA was

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2. The district court assessed the amount of attorneys' fees in a separate order, which the University separately appealed. The Fifth Circuit stayed that appeal pending resolution of the University's petition for writ of certiorari.

invalid under *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). App., at 27a.

The University timely filed a petition for rehearing en banc. Although the Fifth Circuit requested a response from Dr. Siler-Khodr and the United States, the Court ultimately denied the petition. App., at 28a. However, Judge Smith, joined by Judge DeMoss, dissented from the court's order, concluding first that the EPA could not abrogate the States' Eleventh Amendment immunity via Congress's Commerce Clause power, and, second, even if Congress did act pursuant to its §5 powers when it applied the EPA to the States, that attempted abrogation was invalid because the EPA, which does not require evidence of intentional discrimination, is not a congruent and proportional response to congressionally documented constitutional violations by the States. App., at 28a-37a.

SUMMARY OF THE ARGUMENT

In recent years, the Court has limited Congress's authority to abrogate the States' Eleventh Amendment immunity to only one circumstance—when Congress enacts appropriate legislation under §5 of the Fourteenth Amendment to the Constitution. Based on the Court's federalism jurisprudence, Congress's 1974 attempt to abrogate the States' Eleventh Amendment immunity under the EPA fails for two reasons: (1) Congress applied the EPA to the States solely and expressly pursuant to its Commerce Clause Power, which this Court deems insufficient to abrogate States' immunity; and (2) even if Congress did act under §5 of the Fourteenth Amendment, the EPA fails the Court's §5 test because it is not a congruent and proportional response to a specifically identified harm in that there are no congressional findings showing an identified pattern of unconstitutional State behavior.

By erroneously upholding the EPA's attempted abrogation, the Fifth Circuit has joined the emerging trend among the circuits to

bypass the requisite congruence-and-proportionality test under §5 solely because the EPA was intended to remedy sex discrimination. But this Court has never recognized any such exception to it §5 jurisprudence. The circuits' increasing willingness to exempt the EPA from traditional Eleventh Amendment scrutiny undermines the Court's carefully constructed §5 jurisprudence and threatens the delicate balance between the federal government and the States that the Court's recent federalism decisions are intended to preserve.

Additionally, this case merits the Court's attention because it involves the hypothetical posed by the Court in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148 (2000), which indicated that a Title VII defendant would be entitled to judgment as a matter of law if it conclusively proved its legitimate, nondiscriminatory reason for the challenged employment decision and provided abundant and uncontroverted proof that it did not discriminate. Because the Fifth Circuit ignored this scenario—under which the University's evidence squarely fits—it erroneously permitted Dr. Siler-Khodr to recover damages in a situation this Court placed beyond the realm of liability in *Reeves*, and that portion of the judgment cannot stand.

ARGUMENT

I. THE COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI TO RESOLVE IMPORTANT QUESTIONS OF FEDERAL LAW REGARDING THE STATES' ELEVENTH AMENDMENT IMMUNITY.

This case presents an opportunity to resolve two important questions of federal law that have not been—but should be—answered by the Court: (1) whether Congress invalidly applied the EPA to the States under its Commerce Clause power; and (2) if Congress instead applied the EPA to the States pursuant tc its enforcement power under §5 of the Fourteenth Amendment, whether that abrogation of the States' Eleventh Amendment

immunity fails under the Court's §5 congruence-and-proportionality test. Inherent in the second issue is the broader question, currently pending before the Court in *Hibbs v. Department of Human Resources*, whether Congress, when legislating to remedy sex discrimination, is exempt from the Court's standard §5 analysis. 273 F.3d 844, 855-58 (CA9 2001), *cert. granted*, 122 S.Ct. 2618 (2002). This question, as applied to the EPA, merits the Court's review because this result is inconsistent with the Court's clear writings in this area, and is causing confusion among the States and the circuits regarding the boundaries of Eleventh Amendment immunity.

Other circuits, like the Fifth Circuit, have incorrectly applied the Court's Eleventh Amendment jurisprudence and upheld Congress's abrogation of the States' Eleventh Amendment immunity under the EPA. *See Cherry v. Univ. of Wis. Sys. Bd. of Regents*, 265 F.3d 541 (CA7 2001); *Varner v. Ill. State Univ.*, 226 F.3d 927, 931 n.2 (CA7 2000); *cert. denied*, 533 U.S. 902 (2001); *Kovacevich v. Kent State Univ.*, 224 F.3d 806, 816-19 (CA6 2000); *Hundertmark v. Fla. Dep't of Transp.*, 205 F.3d 1272, 1274-65 (CA11 2000); *O'Sullivan v. Minnesota*, 191 F.3d 965, 967-68 (CA8 1999); *Timmer v. Mich. Dep't of Commerce*, 104 F.3d 833, 838 (CA6 1997). These courts reached this erroneous conclusion despite overwhelming evidence that Congress applied the EPA to the States solely pursuant to its Commerce Clause power and despite the absence of congressional findings, specific to the EPA, documenting a pattern of States' intentional, sex-based pay discrepancies that would justify abrogation by means of a statute requiring no evidence of intentional discrimination.

Although there is no circuit split on the narrow issue of whether the EPA validly abrogates the States' Eleventh Amendment immunity, the broader issue—whether legislation dealing with sex discrimination is exempt from the Court's standard §5 jurisprudence—has given rise to a circuit split in the context of

§2612(a)(1) of the Family and Medical Leave Act, 29 U.S.C. §§2601-2654, another statute that attempts to remedy sex discrimination. In particular, the First, Second, Third, Fourth, Fifth, Sixth, Eighth, and Eleventh Circuits have held that the FMLA abrogation is invalid under the congruence-and-proportionality test, rejecting the argument that Congress may avoid strict application of the Court's §5 jurisprudence simply by raising the "specter of sex discrimination,"[3] in contrast to the Ninth Circuit, which has reached the opposite conclusion.[4]

Magnifying the circuit split on the broader sex-discrimination issue and highlighting the confusion in this area is the fact that several of the circuits that have rejected the FMLA abrogation have been internally inconsistent in their treatment of sex discrimination legislation and have upheld the EPA abrogation on precisely this theory.[5] The circuits' inconsistent treatment of federal legislation intended to combat sex discrimination demonstrates that important questions remain regarding Congress's authority to abrogate the States' immunity in this context.

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3. *Kazmier v. Widmann*, 225 F.3d 519, 526 (CA5 2000).

4. *Compare Hibbs*, 273 F.3d, at 844, *with Laro v. New Hampshire*, 259 F.3d 1 (CA1 2001); *Lizzi v. Alexander*, 255 F.3d 128 (CA4 2001), *cert. denied*, 122 S.Ct. 812 (2002); *Townsel v. Missouri*, 233 F.3d 1094 (CA8 2000); *Chittister v. Dep't of Cmty. & Econ. Dev.*, 226 F.3d 223 (CA3 2000); *Kazmier*, 225 F.3d at 519; *Sims v. Univ. of Cincinnati*, 219 F.3d 559 (CA6 2000); *Hale v. Mann*, 219 F.3d 61 (CA2 2000); *Garrett v. Univ. of Ala. Bd. of Tr.*, 193 F.3d 1214 (CA11 1999), *rev'd on other grounds*, 531 U.S. 356 (2001).

5. These circuits include: the Fifth (*compare Kazmier*, 225 F.3d, at 524-27, *with Siler-Khodr*, App., at 13a-15a); the Sixth (*compare Sims*, 219 F.3d, at 561-66, *with Kovacevich*, 224 F.3d, at 806); the Eighth (*compare Townsel*, 233 F.3d, at 1095-96, *with O'Sullivan*, 191 F.3d, at 967-68); and the Eleventh (*compare Garrett*, 193 F.3d, at 1219-20, *with Hundertmark*, 205 F.3d, at 1274-77).

A. The EPA's Purported Abrogation of Eleventh Amendment Immunity Is Invalid Because Congress Relied Solely on Its Commerce Clause Power.

Congress may abrogate the States' Eleventh Amendment immunity only when acting under a valid exercise of authority. *Seminole Tribe*, 517 U.S., at 59. Congress is empowered to authorize suits against the States in only one instance—when acting under its enforcement power pursuant to §5 of the Fourteenth Amendment. *Id.* It is well-established that Congress has no authority under its Commerce Clause power to abrogate the States' sovereign immunity. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 636 (1999); *Seminole Tribe*, 517 U.S., at 72-73. Because the legislative history of the EPA confirms that it was enacted pursuant to the Commerce Clause, not §5, Congress's attempt to abrogate the States' immunity is invalid, and the Fifth Circuit erred in holding that EPA suits may proceed against the States.

The EPA evolved as part of the Fair Labor Standards Act (FLSA). When Congress initially enacted the FLSA in 1938, it expressly invoked its authority under the Commerce Clause and stated its intention to eliminate conditions it found to be detrimental to commerce. *See* Fair Labor Standards Act of 1938, c. 676, §2, 52 Stat. 1060 (1938). This section of the Act, 29 U.S.C. §202, is still in place and explicitly documents Congress's findings of adverse impacts on interstate commerce, declaring that, through the FLSA, Congress is exercising its power to regulate commerce among the States. App., at 44a; *see also* App., at 16a.

Congress amended the FLSA in 1963 to add the EPA. Equal Pay Act of 1963, Pub. L. No. 88-38, §2(b), 77 Stat. 56 (1963). In doing so, Congress made findings regarding "wage differentials based on sex" that caused various negative impacts on industries engaged in commerce or in the production of goods for commerce. Moreover, Congress expressly declared that it was exercising "its

power to regulate commerce among the several states" to correct these adverse impacts. S. 1409, 88th Cong. §2 (1963); H.R. 6060, 88th Cong. §2 (1963); *see also* S. REP. NO. 88-176, at 1 (1963); H.R. REP. NO. 88-309, at 1 (1963), *reprinted in* 1963 U.S.C.C.A.N. 687, 687 (1963). Because the FLSA did not apply to the States in 1963, Congress made no findings regarding pay differentials based on sex for state employees. App., at 18a.

It was against this historical backdrop that, in 1974, Congress amended the definition of "employer" in the FLSA to include public agencies and authorized a cause of action against any employer (including a public agency) for a violation of the Act. *See* Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, §6, 88 Stat. 55 (1974) (codified at 29 U.S.C. §216(b)); App., at 51a. The 1974 amendments simply extended the EPA to the States along with the rest of the FLSA. *Id.* Congress made no additional findings in passing these amendments; thus, there are no findings relating to discriminatory practices by the States sought to be remedied by the EPA.

Although the 1974 amendments contain no specific reference to the power Congress believed it exercised when it passed the legislation, the relevant House and Senate Reports refer to and invoke Congress's Commerce Clause power. *See* H.R. REP. NO. 93-913, at 1-2 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811, 2811-12 (1974); S. REP. NO. 93-690, at 2-4 (1974). House Report 93-913 quotes §202 of the FLSA verbatim, expressly stating that its purpose is to provide an increase in the minimum wage rate, and to extend "the benefits and protection of the Act to workers engaged in commerce or in the production of goods for commerce, or employed in enterprises engaged in commerce or in the production of goods for commerce." H.R. REP. NO. 93-913, at 1-2; App. 44a. Similarly, Senate Report 93-690 states that the general purpose of the 1974 amendments is to increase the minimum wage and

continue the expansion of the Act to protect additional workers. *See* S. REP. NO. 93-690, at 1-13.

Regarding the expansion of the FLSA to cover state employees, the Senate Report expresses Congress's belief that public sector employers affect interstate commerce and declares that the Act should be made applicable to the States because the government should "apply to itself the same standards it applies to private employers." *Id.*, at 24. The report further notes that "there is no doubt that the activities of public sector employers affect interstate commerce," and, therefore, "the Congress may regulate them pursuant to its power to regulate interstate commerce." *Id.* (explaining that "[w]ithout question, the activities of government at all levels affect commerce" and "the volume of wages paid to governmental employees and the activities and magnitude of all levels of government have an effect on commerce as well"). Thus, the report clearly and unequivocally identifies only the Commerce Clause as the source of Congress's power to apply the FLSA—and thus, the EPA—to the States and subject them to suit for violations of those laws.

Neither the 1974 amendments to the FLSA nor the House or Senate Reports specifically refer to the EPA as applied to the States, and no reference is made to pay differentials based on sex by state agencies. Nor is there any reference to unconstitutional state laws that foster discrimination on the basis of sex, or to States denying equal protection of the laws because of wage differentials on the basis of sex. And, finally, there is no discussion or finding in either report that sex-based pay differentials in state jobs require remedial action by Congress under §5. App., at 22a. Rather, Congress apparently applied the EPA to the States—along with the rest of the FLSA—to afford state employees the protection offered by the FLSA and not to remedy a pattern of widespread constitutional violations.

While it is true that Congress need not explicitly invoke §5 in the text of a statute to affect a valid abrogation of immunity, *Equal Employment Opportunity Comm'n v. Wyoming*, 460 U.S. 226, 243 n.18 (1983), there is no doubt after *Florida Prepaid* that at least some indication of the source of Congress's power is required. In *Florida Prepaid*, the Court held that Congress did not properly exercise its §5 power in applying the Patent Remedy Act to the States. 527 U.S., at 646. In so holding, the Court considered and rejected the argument that the Act could be upheld as a proper exercise of Congress's Just Compensation Clause power because "[t]here is no suggestion in the language of the statute itself, or in the House or Senate Reports of the bill which became the statute, that Congress had in mind the Just Compensation Clause of the Fifth Amendment." *Id.*, at 642 n.7.

Moreover, the Court noted that Congress had specifically invoked its Commerce Clause and §5 powers when it enacted the Patent Remedy Act and declined to second-guess Congress regarding the intended source of its power. *Id.* Thus, the Court refused to "rewrite the statutory scheme in order to approximate what Congress might have wanted had it known that [the statute] was beyond its authority." *Seminole Tribe*, 517 U.S., at 76.

The same analysis should apply in this case. In 1974, Congress applied the FLSA to the States under its then-perceived power to do so under the Commerce Clause. The historical context of the FLSA, as well as the House and Senate Reports accompanying the bills that eventually became law, support that, and only that, conclusion. Neither report gives any indication that §5 concerns—namely, unconstitutional pay differentials by the States—were targeted by Congress in the 1974 amendments. Absent some indication that Congress intended to use its §5 power, or at the very least that it was addressing some §5 concern with respect to the States, the circuit courts cannot, after the fact, rely on §5 to justify Congress's actions. *See Fla. Prepaid*, 527 U.S., at 642

n.7; *Seminole Tribe*, 517 U.S., at 76. In reaching a contrary conclusion, the Fifth Circuit ignored *Seminole Tribe* and *Florida Prepaid*—as well as this Court's consistent admonitions that the federal courts may not lightly construe abrogations of state sovereign immunity—and erroneously concluded that the EPA either was or could have been enacted pursuant to Congress's power under §5 of the Fourteenth Amendment. App., at 11a-15a.

By simply assuming that Congress applied the EPA to the States under §5, without any evidence that Congress actually had that intent in 1974—and despite the clear evidence that Congress acted pursuant to its Commerce Clause power—the Fifth Circuit has joined the Sixth, Seventh, Eighth, and Eleventh Circuits in construing an important question of federal law in a manner that conflicts with relevant decisions of this Court. *See* SUP. CT. R. 10(c). The Court should grant the petition for writ of certiorari to correct this erroneous trend regarding Congress's abrogation of the States' Eleventh Amendment immunity under the EPA.

B. Even Assuming Congress Applied the EPA to the States Under Its §5 Power, the Abrogation Fails Because It Cannot Survive the Court's §5 Analysis.

The Court made clear in *City of Boerne v. Flores* that Congress's §5 power is broad but not unlimited. 521 U.S. 507, 518-19 (1997). Section 5 legislation is valid only if it is (1) aimed at remedying a pattern of state action that violates the Fourteenth Amendment, and (2) congruent and proportional to the specific harm identified by Congress. *Id.*, at 529-34. The EPA fails on both counts.

First, the EPA cannot be said to be aimed at remedying a pattern of unconstitutional State action because Congress never identified such a pattern with respect to the States. In 1974, when it applied the FLSA to the States, Congress did not have a separate discussion about the EPA in general, much less one about its applicability to

the States in particular. Rather, without comment, the EPA was simply applied to the States along with the rest of the FLSA. In fact, the only mention of the States in the legislative history is found in Senate Report 93-690, which expressed Congress's intent to treat governmental and private employers alike and Congress's opinion that governmental employers affect interstate commerce such that Congress may, under its Commerce Clause power, regulate their behavior. S. REP. NO. 93-690, at 24. This record, therefore, contains not even a suggestion of findings showing "the pattern of unconstitutional discrimination on which §5 legislation must be based." *Bd. of Tr. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 370 (2001).

Second, even if there were some evidence of unconstitutional, sex-based pay differentials by the States, the EPA is not a congruent and proportional response to that conduct. In particular, the EPA goes well beyond the protection afforded by the Fourteenth Amendment because it does not require a claimant to prove intentional discrimination. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 86 (2000); *see also Garrett*, 531 U.S., at 372-74. Further, the statute is not narrowly tailored to apply specifically to those States found to be engaging in intentional discrimination, but rather applies to all States across the board. *See United States v. Morrison*, 529 U.S. 598, 626-27 (2000); *City of Boerne*, 512 U.S., at 532-33.

The Fourteenth Amendment forbids only *intentional* sex discrimination. *Pers. Adm'r v. Feeney*, 442 U.S. 256 (1979). The Constitution is violated when a state decisionmaker selects or reaffirms a course of action "because of, not merely in spite of, its adverse effects upon an identifiable group." *Id.*, at 279 (citations omitted). The EPA, however, does not require evidence of intentional discrimination. Once a claimant proves an employer is paying a member of the opposite sex a higher salary for equal work, the claimant has established a prima facie case, and the burden of

proof shifts to the employer to prove one of four exceptions as an affirmative defense.[6] 29 U.S.C. 206(d); *see also Corning Glass Works v. Brennan*, 417 U.S. 188, 195-97 (1974). Any unexplained difference in pay is automatically attributed to discrimination—and liability is imposed—with no showing whatsoever of intentional sex discrimination. *See Corning Glass Works*, 417 U.S., at 196-97.

Because the EPA does not require what the Fourteenth Amendment requires—a showing of intentional discrimination—the EPA's statutory scheme conflicts with well-established constitutional principles. *See Kimel*, 528 U.S., at 86. And while Congress is not categorically prohibited from enacting prophylactic legislation that makes some constitutional conduct illegal, *see id.*, at 81, this Court has never held that Congress may shift the burden of proof to a State defendant to disprove an allegation of sex discrimination with proof of an alternative reason for its employment decision.[7] As Judge Smith noted in his dissent

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6. The four affirmative defenses are: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; and (4) any other factor other than sex. 29 U.S.C. §206(d)(1); App., at 47a. However, the affirmative defenses do not eliminate the danger that the EPA can be used to prohibit an excessively broad range of constitutional state conduct because, although they may seem comprehensive, there are likely to be cases in which none of them apply even though there is no intentional, unconstitutional sex discrimination. App., at 34a.

7. Although the Court's *McDonnell Douglas* test establishes a "burden shifting" mechanism in certain Title VII cases, the defendant only bears the burden of *production*. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993) (quoting *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981)). By shifting the burden of *proof*,

from the Fifth Circuit's denial of the University's petition for rehearing en banc, "[t]he requirement that the defendant state affirmatively prove not only its lack of a discriminatory intent but also the existence of a valid alternative ground for its decision ensures that a substantial amount of constitutional state action will run afoul of the EPA." App., at 34a-35a.

Additionally, the EPA fails the congruence-and-proportionality test because it is not limited to only those States that may be engaging in unconstitutional sex discrimination. *See Morrison*, 529 U.S., at 626-27; *City of Boerne*, 512 U.S., at 532-33. Even when considering legislation aimed at preventing and remedying racial discrimination, the Court has required Congress to tailor its remedy to the States that have a history of discrimination. *See South Carolina v. Katzenbach*, 383 U.S. 301, 328-31 (1966). And, even if some remedy for sex discrimination might have been reasonable when Congress applied the FLSA to the States in 1974, circumstances have changed because most States, including Texas, have enacted statutes that prohibit intentional sex discrimination.[8]

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the EPA thus substantively conflicts with the Court's standard test for intentional discrimination.

8. TEX. LAB. CODE ANN. §§21.001, .051; *see also* ALASKA STAT. §§18.80.220, .330; ARIZ. REV. STAT. §§41-1461, 1463; CAL. CONST. art. I, §31; COLO. REV. STAT. ANN. §§24-34-401,402; §§8-5-101, 102; CONN. GEN. STAT. ANN. §§5-196, 227; DEL. CODE ANN. tit. 19, §§710, 711; D.C. CODE ANN. §§2-1401.02, 1402.11; FLA. STAT. ANN. §110.105; GA. CODE ANN. §§45-19-22, 29; HAW. REV. STAT. §§378-1, 2; IDAHO CODE §67-5902, 5909; ILL. COMP. STAT. ANN. 10/1-1; IND. CODE §4-15-12-2; IOWA CODE §19B.2; KAN. STAT. ANN. §§44-1002, 1009; KY. REV. STAT. ANN. §§344.010, .030, .040; LA. REV. STAT. ANN. §§302, 332; ME. REV. STAT. ANN. tit. 5, §784; MD. CODE ANN. §§15, 16; MASS. ANN. LAW ch.151B §§1, 4; MICH. COMP. LAWS §§37-2103, 2201, 2202; MINN. STAT. ANN. §43A.01; MISS. CODE ANN. §25-9-149; MO. ANN. STAT. §§213.010, .055; MONT. CODE ANN. §49-3-201; NEB. REV. STAT. §§48-

Because it failed to apply the congruence-and-proportionality test established in *City of Boerne*, and consistently followed in *Florida Prepaid*, *Kimel*, and *Garrett*, the Fifth Circuit never addressed these issues. Instead of examining the record for evidence of a pattern of unconstitutional pay differentials by the States, the Fifth Circuit excused the lack of congressional findings because "the 'historical record clearly demonstrates that gender discrimination is a problem that is national in scope,' whether or not committed in the public sector." App., at 14a-15a (quoting *Varner*, 226 F.3d, at 935-36; *Kovacevich*, 224 F.3d, at 821 n.6 (stating that "we are satisfied by Congress's more general finding in enacting the original EPA that wage differentials are due to outmoded beliefs about the relative value of men's and women's work . . . combined with the fact that women have been subjected to a history of purposeful unequal treatment more generally")).

Additionally, the Fifth Circuit failed to acknowledge, much less analyze, the burden-shifting nature of the EPA under the congruence-and-proportionality test, making only the unremarkable observation that "state discrimination on the basis of race or gender . . . requires higher standards of review and a tighter fit between the discriminatory means and the legitimate ends they serve." App., at 13a (citations omitted). In other words, the Fifth Circuit ignored

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1102, 1104; NEV. REV. STAT. §§613.310, .330; N.H. REV. STAT. ANN. §§354-A:2, :7; N.J. STAT. ANN. §§10:5-5, 12; N.M. STAT. ANN. §§28-1-2, 7; N.Y. EXEC. LAW §§11, 291; N.C. GEN. STAT. §126-16; N.D. CENT. CODE §§34-06.1-02, 03; OHIO REV. CODE ANN. §§4112.01, .02; OKLA. STAT. tit. 74, §840-2.9; OR. REV. STAT. §§30.26-0, 659A.001, 659A.030; 43 PA. CONS. STAT. ANN. §§954, 955; R.I. GEN. LAWS §28-5.1-4; §28-5-6,7; S.C. CODE ANN. §1-13-80; S.D. CODIFIED LAWS §§20-13-1, 10; TENN. CODE ANN. §§4-21-102, 401; UTAH CODE ANN. §§34A-5-102, 106; VT. STAT. ANN. tit. 3, §§902, 961; VA. CODE ANN. §2.2-4200; WASH. REV. CODE ANN. §49.60.400; W. VA. CODE §5-11-3, 9; WIS. STAT. §§111.32, 321; WYO. STAT. ANN. §§27-9-102, 105.

the congruence-and-proportionality test in favor of the assumption that the EPA is a valid abrogation of Eleventh Amendment immunity simply because sex discrimination receives a heightened level of scrutiny under equal-protection analysis.

However, this conclusion is foreclosed by the Court's prior decisions. First, the Fifth Circuit's acceptance of evidence of private-sector discrimination in 1963 as sufficient documentation to justify Congress's abrogation of the States' Eleventh Amendment immunity in 1974 conflicts with the Court's jurisprudence.[9] The Court has repeatedly refused to infer a pattern of unconstitutional state conduct based on evidence that such behavior was occurring in the private sector. *See Garrett*, 531 U.S., at 369; *Kimel*, 528 U.S., at 90-91; *Fla. Prepaid*, 527 U.S., at 640-41.

Moreover, the Fifth Circuit's presumption that the EPA presents a valid abrogation of the States' Eleventh Amendment immunity simply because sex discrimination receives heightened equal-protection scrutiny finds no support in the Court's decisions. The Court has never created any exception, much less a "sex-discrimination exception," to its §5 analysis. Rather, the Court has consistently required Congress to identify a pattern of unconstitutional state behavior and to satisfy the congruence-and-proportionality test by tailoring its chosen remedy to the harm it intends to address.

For example, in *Morrison*, the Court invalidated a provision of the Violence Against Women Act that the federal government

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9. The Fifth Circuit is not alone in this regard. The Sixth, Seventh, and Eleventh Circuits have also held that the EPA abrogation is justified by evidence that private-sector employers were discriminating on the basis of sex. *See Varner*, 226 F.3d, at 935-36; *Kovacevich*, 224 F.3d, at 819-20; *Hundertmark*, 205 F.3d, at 1276.

defended as a remedy for unconstitutional sex discrimination. *See Morrison*, 529 U.S., at 626-27. Notably, the Court did not abandon its traditional §5 analysis because the statute at issue concerned sex discrimination. Rather, it reiterated that §5 legislation must demonstrate a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.*, at 625-26 (quoting *Fla. Prepaid*, 527 U.S., at 639; *City of Boerne*, 521 U.S., at 526). Furthermore, the Court explained that Congress had not documented a pattern of *widespread* unconstitutional behavior by the States because it only produced evidence that *some* States engaged in discrimination against victims of gender-motivated crimes. *Id.*, at 626.

The same is true of the Court's analogous decision in *City of Boerne*, which addressed Congress's attempt to preserve religious freedom under its §5 power through the Religious Freedom Restoration Act. 521 U.S., at 529. Even though state laws that intentionally discriminate on the basis of religion are subject to a heightened level of scrutiny, the Court did not give Congress the benefit of the doubt that the statute complied with the congruence-and-proportionality test simply because the statute attempted to remedy this type of violation. Rather, the Court invalidated the statute after conducting a thorough analysis of the remedial measures it prescribed in relation to the lack of documented State misconduct. *Id.*, at 529-35.

Finally, in *South Carolina v. Katzenbach*, the Court upheld provisions of the Voting Rights Act as appropriate remedies for racial discrimination in state voting procedures. 383 U.S., at 315. In reaching its conclusion that the provisions were appropriate §5 legislation, however, the Court did not rely on the historical fact that racial discrimination existed. Nor did it presume the statute's validity simply because racial discrimination is subject to strict scrutiny. Instead, the Court examined the narrowly tailored remedy constructed by the statute in relation to the Act's extensive

legislative history and documentation of actual state misconduct and intentional racial discrimination. *Id.*, at 310-16.

Here, the Fifth Circuit conducted no remotely comparable analysis. Contrary to the Court's holdings in *City of Boerne*, *Florida Prepaid*, *Kimel*, and *Garrett*, the Fifth Circuit failed to identify in the EPA's legislative history a pattern of unconstitutional state conduct that would justify the abrogation of the States' Eleventh Amendment immunity by means of a statute that requires no evidence of intentional discrimination. It essentially held that Congress is not required to comply with *any* aspect of the Court's §5 test when legislating to remedy sex discrimination. This erroneous assumption cannot be reconciled with *Morrison*, *City of Boerne*, and *Katzenbach*. Because the Court rigorously applied the §5 analysis in those cases, it cannot reasonably be supposed that a less stringent §5 test should be applied to legislation dealing with sex discrimination in the context of the EPA.

The Fifth Circuit's rejection of the Court's well-established §5 analysis—as well as the Sixth, Seventh, Eighth, and Eleventh Circuits'—injects uncertainty into and undermines the Court's §5 jurisprudence. Moreover, it threatens the system of federalism by diluting the States' residuary and inviolable sovereignty. The Court should grant the petition for writ of certiorari to resolve this important issue of federal constitutional law.

II. THE COURT SHOULD ALSO ADDRESS A QUESTION OF IMPORTANCE TO THE NATION'S PUBLIC UNIVERSITIES UNDER TITLE VII REGARDING SALARY VARIANCES.

This case also presents the Court with the opportunity to illuminate the circumstance left open in *Reeves v. Sanderson Plumbing Products, Inc.*, "where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could

conclude that the action was discriminatory." 530 U.S. 133, 148 (2000). That very situation exists here because the University conclusively established "some other, nondiscriminatory reason for [its] decision," *see id.*, *i.e.*, the payment of a higher salary to recruit a new faculty member. Because this legitimate, non-discriminatory reason will recur within the public university setting whenever female faculty are employed and a new male faculty member is recruited, the Court should clarify that, as a matter of law, this evidence is of the type that effectively rebuts a Title VII claim under *Reeves*.

Public universities consistently face the problem that long-time employees' salaries cannot keep pace, through raises, with rises in salaries in the private-sector market. The pay differential between Dr. Siler-Khodr, hired in 1976, and Dr. Shain, hired in 1989, is typical of that phenomenon and has nothing to do with intentional sex discrimination. Irrespective of sex, a university faculty member hired in 1976, who subsequently receives regular state-mandated and merit-based raises, is likely to make less in 1989 than a newly hired faculty member of comparable rank in the same discipline. This discrepancy occurs because the raises awarded the 1976-hired employee were not driven by market forces, but by university and statewide budget constraints.

The Court should address the recurring issue whether, as a matter of law, a public university can rebut a claim under Title VII if it hires a male faculty member at a salary that is directly related to what he earned at his previous employment, even if doing so would require the university to pay him more than it is paying its current female faculty.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

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August 14, 2002

Theresa M. SILER-KHODR, Plaintiff-Appellee,
v.
The UNIVERSITY OF TEXAS HEALTH SCIENCE CENTER SAN ANTONIO; et al., Defendants,
and
The University of Texas Health Science Center San Antonio, Defendant-Appellant.

No. 00-50092.

United States Court of Appeals,
Fifth Circuit.

Aug. 24, 2001.

On Appeal from the United States District Court
for the Western District of Texas

Before POLITZ, DeMOSS and STEWART, Circuit Judges.

CARL E. STEWART, Circuit Judge:

The University of Texas Health Science Center San Antonio ("UTHSCSA" or the "University") appeals from a final judgment awarding Dr. Theresa M. Siler-Khodr ("Siler-Khodr") $91,000 back pay and $20,000 of compensatory damages, including costs and prejudgment interest, because the jury found that UTHSCSA had discriminated against Siler-Khodr on the basis of her gender in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e ("Title VII") and paid her unequally in violation of the Equal Pay Act, 29 U.S.C. § 206(d) ("Equal Pay Act" or "EPA"). For the following reasons, we affirm the judgment.

FACTUAL & PROCEDURAL BACKGROUND

Siler-Khodr began her career at UTHSCSA in the Department of Obstetrics and Gynecology ("Ob/Gyn Department") as an assistant professor in 1976. She has a Ph.D. in biochemistry, and

she is a reproductive endocrinologist specializing in the area of hormones involved with the female reproductive system. Siler-Khodr primarily conducts laboratory research in this field. She also publishes the results of her research, supervises Fellows, and teaches classes. She has also directed clinical and research laboratories. Siler-Khodr became a Full Professor with tenure in 1986, and her supervisor is Dr. Robert Schenken ("Schenken").

Dr. Sydney Shain ("Sydney") is also in the Department and joined the University in 1989. According to UTHSCSA, Sydney was hired in an effort to retain Dr. Rochelle Shain ("Rochelle"), Sydney's wife and one of the four Ph.D. researchers in the Ob/Gyn Department. Rochelle informed Dr. Carl Pauerstein ("Pauerstein"), chair of the Department since 1979, that her husband wanted to leave his job at the Southwest Foundation for Biological Research in San Antonio where he earned $80,000 per year. Pauerstein offered Sydney a job with the University at a salary of $83,000, in part, because he was concerned that Sydney would seek employment outside of San Antonio, causing Pauerstein to lose Rochelle. Siler-Khodr's salary at the time was $64,354. The University also justifies Sydney and Siler-Khodr's difference in pay by asserting that Sydney has been more successful than Siler-Khodr in obtaining grant funding.

The University currently pays Sydney approximately $20,000 per year more than Siler-Khodr. He, however, like Siler-Khodr, 1) has a Ph.D. in biochemistry; 2) primarily conducts laboratory research regarding reproductive endocrinology; 3) publishes the results of his research; 4) supervises departmental Fellows; 5) teaches classes; and 6) is supervised by Dr. Schenken. Similarly, Pauerstein testified at trial that Siler-Khodr and Sydney have essentially the same duties and responsibilities.

Siler-Khodr filed suit in state district court against UTHSCSA, alleging in part violations of Title VII and of the EPA. The University subsequently removed to federal court. At trial, Siler-

Khodr presented two studies: 1) the Women's Faculty Association Report conducted by the University in 1994 and 2) a report and testimony of Dr. Mary Gray ("Gray"), an expert statistician and Full Professor of mathematics and statistics at American University, in which she conducted a multiple regression analysis that controlled for a variety of factors.

Both reports indicated that gender significantly affected faculty salaries at the University. After adjusting for confounding factors such as rank, degree, tenure, duration in the institution and age, women tended to earn lower salaries than men. The reports studied salaries university- wide, and neither of them distinguished faculty salaries among medical specialities. The University contends that the Women's Faculty Association report was inherently flawed since, for example, more women tend to be pediatricians than surgeons at medical schools across the country and at UTHSCSA, and surgeons make considerably higher salaries than pediatricians. Moreover, UTHSCSA argues that the report did not analyze salaries within the Ob/Gyn Department and mentioned nothing regarding Siler-Khodr's salary. The University also asserts that Gray's report speaks only to the salary structure throughout the University. The report does not speak to the Ob/Gyn Department or the medical school in particular and does not pertain to Siler-Khodr's individual salary. In response, Siler-Khodr contends that the University offered no expert testimony of its own at trial. Dean James Young ("Dean Young"), dean of the Medical School, however, testified at trial that he disagreed with the Women's Faculty Association study's conclusion. The University also cross-examined Gray's report.

A jury subsequently returned a verdict for Siler-Khodr on the issues of sex discrimination under Title VII and unequal pay under the Equal Pay Act. In addition to ordering back pay in the amount of $91,000 and compensatory damages in the amount of $20,000, it also ordered the University to equalize Siler-Khodr's

compensation to that of Sydney and to pay her all sums necessary to accomplish that equalization retroactive to the date the jury returned the verdict. The district court further awarded Siler-Khodr an additional $91,000 in liquidated damages in keeping with the jury's finding under the Equal Pay Act, as well as reasonable attorneys' fees. UTHSCSA moved for a judgment as a matter of law, pursuant to Rule 50(a) of the Federal Rules of Civil Procedure, that the district court denied. The University now appeals.

DISCUSSION

I. *Rule 50(a) Motion and the Sufficiency of Evidence*

Rule 50(a) states that "[i]f during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law. . . ." FED.R.CIV.P. 50(a). This Court reviews de novo the trial court's ruling on a Rule 50(a) motion. *Travis v. Bd. of Regents of the Univ. of Texas Sys.*, 122 F.3d 259, 263 (5th Cir.1997). Moreover, in reviewing a Rule 50(a) motion, this Court "should review all of the evidence in the record . . . [but] must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Id.* at 150-51, 120 S.Ct. 2097 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

The district court refused to grant the University's Rule 50(a) motion for a judgment as a matter of law on Siler-Khodr's claims alleging violations of Title VII and the EPA. Title VII states that it is unlawful "to discriminate against any individual with respect to

his compensation ... because of such individual's sex." 42 U.S.C. § 2000e-2(a). Hence, a Title VII claim alleges "individual, disparate treatment." *Plemer v. Parsons-Gilbane,* 713 F.2d 1127, 1135 (5th Cir.1983). Because the facts in a particular Title VII case will differ, the evidence necessary to prove a prima facie case of discrimination under Title VII will vary. *Id.* However, this Court has noted that although a plaintiff may present:

> statistics evidencing an employer's pattern and practice of discriminatory conduct, which "may be helpful to a determination of whether" the alleged discriminatory act against the plaintiff "conformed to a general pattern of discrimination against" members of a protected group .... that evidence is "not determinative of an employer's reason for the action taken against the individual grievant."

Id. (citing *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) and *Terrell v. Feldstein Co.,* 468 F.2d 910, 911 (5th Cir.1972)).

In contrast, the EPA has a higher threshold, requiring that an employer not discriminate "between employees on the basis of sex ... for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." 29 U.S.C. § 206(d)(1). In short, it demands that equal wages reward equal work. *Corning Glass Works v. Brennan,* 417 U.S. 188, 195, 94 S.Ct. 2223, 41 L.Ed.2d 1 (1974). Once a plaintiff has made her prima facie case by showing that an employer compensates employees differently for equal work, the burden shifts to the defendant to "prove by a preponderance of the evidence that the wage differential is justified under one of the four affirmative defenses set forth in the Equal Pay Act: (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) any other factor than sex." *Kovacevich v. Kent State Univ.,* 224 F.3d 806, 826 (6th Cir.2000) (citing 29 U.S.C. § 206(d)(1)). The EPA's affirmative defenses have been incorporated into Title VII by the

Bennett Amendment to the Act. *Id.* at 828. "Generally, [however,] a Title VII claim of wage discrimination parallels that of an EPA violation." *Id.*

A. *Statistics*

The University contends that the trial court erred when it failed to grant its Rule 50(a) motion because the evidence was legally insufficient to support the jury's findings of sex discrimination and unequal pay. It asserts that the two reports that Siler-Khodr presented regarding gender disparities in faculty salaries showed neither discrimination in the Ob/Gyn Department nor by Pauerstein. UTHSCSA asserts that Siler-Khodr, therefore, failed to prove intentional discrimination under Title VII. As supporting authority, the University cites three cases, *Zahorik v. Cornell University*, 729 F.2d 85, 95 (2d Cir.1984), *Pollis v. New School for Social Research*, 132 F.3d 115, 121-23 (2d Cir.1997) (holding that plaintiff's statistics did not support an inference of discrimination when the statistical group was comprised of individuals not fairly comparable to the plaintiff), and this Court's recent opinion in *Wyvill v. United Co. Life Ins. Co.*, 212 F.3d 296 (5th Cir.2000).

The University, however, fails to mention *Plemer*, a Fifth Circuit case almost directly on point. Moreover, the cases that UTHSCSA cites are inapposite. First, the Fifth Circuit stated in *Plemer*, a case with facts quite similar to those in the instant case, that

> [i]f an employee establishes by statistics that an employer had a discriminatory practice or policy toward employees of the claimant's gender, the court may infer that the employer's justification for an action it took against the plaintiff was merely pretext and that the action was really taken on the basis of the plaintiff's gender in conformance with the general practice of discrimination.

713 F.2d at 1137.

Indeed, this Court stated that the district court should have considered the plaintiff's statistics as evidence that rebutted the employer's evidence that the wage disparity between her and another male employee for the same position hinged on a "factor other than sex." *Id.*

Second, the study in *Zahorik* did not consider discriminatory wage structures, and the statistics were limited in numbers, remote in time, based upon the statisticians' "estimates," and reflected a deliberate exclusion from consideration of nearly 50 tenure decisions. Third, *Pollis* is distinguishable from the instant case. The petitioner's statistics in that case failed because her sample group was too small, consisting of only eight faculty members, and too spread out over time, covering the years 1974-1993, to be probative of anything. In contrast, both studies that Siler-Khodr presented analyzed salary data of hundreds of faculty members, university-wide, during a single year. Fourth, *Wyvill* may be distinguished because it did not even involve statistics, but anecdotal evidence of how other individuals had been treated by the employer.

Furthermore, the Supreme Court has specifically addressed the University's arguments regarding the regression analysis in Gray's report. The Court concluded that "[w]hile the omission of variables from a regression analysis may render the analysis less probative than it otherwise might be, it can hardly be said, absent some other infirmity, that an analysis which accounts for the major factors 'must be considered unacceptable as evidence of discrimination.'" *Bazemore v. Friday*, 478 U.S. 385, 400, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986) (citation omitted). "Normally, failure to include variables will *affect the analysis' probativeness, not its admissibility.*" *Id.* (emphasis added). Furthermore, the Court stated that "[a] plaintiff in a Title VII suit need not prove discrimination with scientific certainty; rather, his or her burden is to prove discrimination by a preponderance of the evidence." *Id.*

Thus, although both reports do not study faculty salaries by medical sub- specialty or study Pauerstein's individual conduct, they are sufficient to prove discrimination under a Title VII claim according to Supreme Court and this Court's precedent. Moreover, it is noteworthy that the University failed to present evidence at trial rebutting the conclusions of the reports that Siler-Khodr presented into evidence. In contrast, Siler-Khodr put forth ample evidence to overcome the Rule 50(a) motion, including her testimony, Gray's testimony, and the studies themselves. Finally, the Supreme Court has noted that the inclusion of specific variables does not affect the studies' probativeness as much as their admissibility. Therefore, regarding the studies in favor of Siler-Khodr, we hold that the district court did not err in denying the Rule 50(a) motion, given that it is the province of the jury, not the court, to make credibility determinations regarding the reports.[1] *Reeves,* 530 U.S. at 150-51, 120 S.Ct. 2097.

B. *Affirmative Defenses*

1. *Grant-Obtaining Abilities*

The University offered two affirmative defenses at trial to explain the wage differential alleged in Siler-Khodr's EPA and Title VII claims: 1) Sydney was more productive in his ability to secure grants than Siler-Khodr and 2) Pauerstein offered Sydney a higher salary than that of Siler-Khodr as an incentive to retain his wife, Rochelle, a professor in the department since 1976, based on Sydney's prior salary and market forces. With respect to the first

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1. For the same reasons, the University's arguments regarding the issue of whether the trial court erred by admitting into evidence unreliable and irrelevant statistical evidence and therefore abused its discretion and substantially prejudiced the University by forcing it to defend allegations of discrimination against all female faculty in the University, are unpersuasive.

affirmative defense, Pauerstein testified at trial that the single most important criterion he uses to allocate money for raises is success in obtaining grant funding.[2]

Siler-Khodr testified at trial that she had brought in $2.8 to $2.9 million in grants over the course of her tenure at the University as a principal investigator. In contrast, Sydney testified that he had obtained in excess of $1.9 million in grant money to the University. Pauerstein, however, testified that the department had attributed $2.9 million in grant funding, all from NIH, to Sydney as a Principal Investigator ("PI") during the years 1989-1999. During the period 1975-1999, however, Pauerstein testified that Siler-Khodr obtained only $600,000 in grant funding as a principal investigator, all from NIH.

Sydney also testified that although he had not obtained any new grant funding since 1995, he had received raises since that time. Pauerstein testified that he did not recommend a raise for Sydney in 1999 because he had been unable to receive a grant. Similarly, Pauerstein testified that he did not recommend Siler-Khodr for a raise in 1999 because her track record in bringing in grant support was not "excellent," although she had obtained grant support for that year. In 1991, however, Pauerstein recommended a raise for Siler-Khodr that was over five percent greater than that which he recommended for Sydney.[3]

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2. He also stated at trial that grants from the National Institutes of Health ("NIH") are the most prestigious grants, as they are peer-reviewed.

3. Pauerstein has recommended Siler-Khodr for merit raises in fifteen out of the seventeen years that raises were available. Between the years 1991 and 2000, Siler-Khodr received raises that increased her salary by 28.8% and Sydney received raises that increased his salary by 30%.

Siler-Khodr argues that the University's grant-obtaining defense is mere pretext for the discrepancy between her and Sydney's compensation. She notes, in contrast to Pauerstein's testimony regarding the importance of obtaining grants in evaluating salary raises, that Dean Young wrote in a 1996 letter that "[t]here are no institutionally specified factors to consider as a basis for determining total annual compensation." Siler-Khodr also contends that the University presented neither a campus-wide nor departmental policy showing that this factor had ever been used as a wage-setting criterion. Although she was informed in her 1996 and 1997 faculty evaluations that she needed to improve her ability to obtain further grant funding for research studies, there is no evidence in the record that Siler-Khodr had been criticized in her evaluations for not obtaining sufficient funding prior to 1996 and 1997. The record also reflects that she had not been informed that she was paid less because of her purportedly lesser ability to obtain grants.

A review of the record therefore indicates that Siler-Khodr presented sufficient evidence at trial to support the jury's finding that the University's grant-obtaining affirmative defense was pretext for its paying Siler-Khodr a lower wage than Sydney. We, therefore, hold that the district court did not err.

2. *Prior Salary/Market Forces*

The trial court similarly did not err when it denied the University's motion for judgment as a matter of law because the record shows that UTHSCSA's affirmative defense to Siler-Khodr's claims based on Sydney's prior salary and market forces is pretext as well and is easily rebutted. Pauerstein testified that he offered a faculty position to Sydney because he wanted to retain Rochelle as a member of the Ob/Gyn Department. Sydney testified at trial that his primary reason for accepting employment at the University was that he had tired of the responsibilities at his job in private industry and he wanted to pursue academic research.

Moreover, although he testified that there were no negotiations regarding his salary offer with the University, he also testified that had his salary offer not been in excess of $80,000, he probably would have asked for a higher salary. The trial court, however, did not err when it adjudged that the evidence was legally sufficient to rebut this affirmative defense because the record reflects that Sydney's primary reason for accepting Pauerstein's offer was not related to salary.

The University also argues that market forces dictated a higher salary for Sydney. It relies on the testimony of Dean Young, who stated that the wage differential is justified, given that the salary paid to a new employee is driven almost entirely by market forces the University must expend resources to attract qualified individuals in a market where other organizations have the same goal. This Court has previously stated that the University's market forces argument is not tenable and simply perpetuates the discrimination that Congress wanted to alleviate when it enacted the EPA. *See Brennan v. City Stores, Inc.*, 479 F.2d 235, 241 n. 12 (5th Cir.1973) (stating that factors other than sex such as "the tighter market for salesmen and male tailors" does not justify "its hiring of men with such skills at a rate higher than that paid to obtain women of similar skills").

II. *Constitutionality of the EPA*

The University asserts that Congress exceeded its authority when it abrogated the states' Eleventh Amendment immunity in the EPA, in light of the Supreme Court's recent opinion in *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000). *Kimel* held that the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621, although containing a clear statement of Congress's intent to abrogate state immunity, was not a valid exercise of Congress's power under § 5 of the Fourteenth Amendment to abrogate state immunity and

extend liability to the states. *Kimel,* 528 U.S. at 78-80, 120 S.Ct. 631. In addition, UTHSCSA argues that Congress not only unconstitutionally invoked its authority under Article I to abrogate state immunity, but it also lacked authority to abrogate state immunity under § 5 because Congress failed to find widespread constitutional violations by the states when it amended the EPA to extend liability to the states in 1974.[4] The University consequently argues that the Act fails the congruence and proportionality test outlined in *City of Boerne v. Flores,* 521 U.S. 507, 519-20, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997).

This Court reviews de novo the question of whether a state is entitled to immunity under the Eleventh Amendment. *Ussery,* 150 F.3d at 434. This Court in *Ussery* explicitly upheld the constitutionality of the EPA under the Eleventh Amendment in a similar challenge when it stated, "[b]y amending the EPA to include the States as employers, Congress sought to eliminate such discrimination by the States themselves ... [and] it goes without saying that the substantive provisions of the Fourteenth Amendment prohibit the States from discriminating on the basis of gender." *Id.* at 437. Moreover, this Court in *Ussery* expressly rejected the argument that the University makes regarding Congressional reliance on Article I to amend the EPA to include the states. It stated that "the 1974 Amendments were a separate statute, and we must examine that statute and its legislative history to

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4. In 1963, Congress enacted the EPA pursuant to its Commerce Clause powers, and it limited liability under the EPA to private employers. *Ussery v. Louisiana,* 150 F.3d 431, 435 (5th Cir.1998). In 1974, when Congress amended the EPA to apply to the states, however, it did not provide a definitive statement regarding the Constitutional authority under which it acted. *Id.*

determine if Congress stated its intent to legislate under any particular constitutional provision." *Id.* at 436 n. 2.[5]

We find that in the wake of *Kimel*, the EPA nevertheless does not violate the Eleventh Amendment of the Constitution because it is congruent and proportional "between the injury to be prevented or remedied and the means adopted to that end" and is therefore an appropriate use of Congress's § 5 power of the Fourteenth Amendment. *City of Boerne*, 521 U.S. at 520, 117 S.Ct. 2157. *Kimel* held that the ADEA was not an appropriate use of Congress's § 5 power because it was not congruent and proportional to the means employed by the Equal Protection Clause to prohibit discrimination by the states on the basis of age. *Kimel*, 528 U.S. at 82-86, 120 S.Ct. 631. The Court essentially found that the discriminatory conduct that is prohibited by the ADEA, as applied to the states, is disproportionate to similar conduct prohibited by the Constitution's Equal Protection Clause. *Id.*

The *Kimel* Court distinguished between state discrimination on the basis of age, which requires rational review under Equal Protection, and state discrimination on the basis of race or gender, which requires higher standards of review and "a tighter fit between the discriminatory means and the legitimate ends they serve." *Id.* at 84, 120 S.Ct. 631. Importantly, other courts to consider this issue post-*Kimel* have been similarly swayed.[6] *See Varner*, 226 F.3d at

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5. Other courts examining this issue pre-*Kimel* have agreed with the Fifth Circuit's holding in *Ussery*. *See, e.g., Varner v. Illinois State Univ.*, 226 F.3d 927, 935 n. 4 (7th Cir.2000), *cert. denied*, 533 U.S. 902, 121 S.Ct. 2241, 150 L.Ed.2d 230 (2001).

6. Similarly, the Court's recent decision in *Board of Trustees of the University of Alabama, et al. v. Garrett, et al.*, 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001), supports our holding. The *Garrett* Court held that the Americans with Disabilities Act ("ADA") unconstitutionally

934-35; *Hundertmark v. Florida Dept. of Transp.*, 205 F.3d 1272, 1276-77 (11th Cir.2000); *Kovacevich*, 224 F.3d at 819-21; *Anderson v. State Univ. of New York*, 107 F.Supp.2d 158, 165 (N.D.N.Y.2000).

Moreover, although the *Kimel* Court discussed the lack of legislative findings regarding unconstitutional age discrimination by the states, it nonetheless stated "that lack of support is not determinative of the § 5 inquiry." *Kimel*, 528 U.S. at 91, 120 S.Ct. 631. Other courts examining the lack of legislative findings regarding the discriminatory practices by the states on the basis of gender have found this argument unpersuasive, as the "historical record clearly demonstrates that gender discrimination is a problem that is national in scope," whether or not committed in the public sector. *Varner*, 226 F.3d at 935-36; *see also Kovacevich*, 224 F.3d at 821 n. 6 (stating that "we are satisfied by Congress's more general finding in enacting the original EPA that wage differentials are due to outmoded beliefs about the relative value of men's and women's work ... combined with the fact that women have been subjected to a history of purposeful unequal treatment more generally" (internal citations omitted)). Thus, we hold that the EPA is constitutional under the Eleventh Amendment.

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abrogates the states' Eleventh Amendment immunity because 1) discrimination in employment against the disabled is reviewed under rational basis for purposes of the Equal Protection Clause and 2) the legislative record of the ADA fails to reveal that Congress identified a pattern of irrational state discrimination. *Id.* at 963-66. Here, gender, unlike disability, is reviewed under a stricter test in Equal Protection, which the *Kimel* Court took pains to address. *See Kimel*, 528 U.S. at 84, 120 S.Ct. 631. Moreover, in contrast to disability, the historical record clearly documents state discrimination on the basis of gender. Hence, the lack of further Congressional findings regarding gender discrimination by the states is less significant in importance.

CONCLUSION

We affirm the district court's denial of UTHSCSA's motion for judgment as a matter of law because its judgment was legally sufficient to support the jury's findings of prima facie sex discrimination under Title VII and unequal pay under the EPA. We also agree with our sister circuits that the EPA does not violate the Eleventh Amendment of the Constitution in light of the Supreme Court's decision in *Kimel.*

AFFIRMED.

DeMOSS, Circuit Judge, concurring in part and dissenting in part:

Insofar as the majority opinion affirms the judgment of the district court and the jury verdict authorizing recovery against the University for discrimination under Title VII (42 U.S.C. § 2000e et seq.), I reluctantly concur. The holding of the Supreme Court in *Fitzpatrick v. Bitzer,* 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976), which held that suits brought in federal court by a private citizen against a state for recovery of damages pursuant to Title VII were not barred by the Eleventh Amendment because in adopting the 1972 Amendments to the Civil Rights Act, Congress expressly acted pursuant to § 5 of the Fourteenth Amendment, is controlling. While I see substantial inconsistencies between the Supreme Court's holding in *Fitzpatrick v. Bitzer* and several recent Supreme Court cases, I have not found anything in those recent cases that would overrule the holding in *Fitzpatrick v. Bitzer,* and we are, therefore, bound by that holding until the Supreme Court itself modifies or overrules it.

As to the portion of the majority opinion that affirms the district court's award of money damages based on the jury finding of a violation of the Equal Pay Act of 1963, Pub.L. No. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206(d)), I respectfully dissent. I write to explain why I believe the majority opinion is in

error in concluding that, in 1974 when Congress amended the provisions of the Fair Labor Standards Act (FLSA) so as to give individual state employees a cause of action in federal court against a state, Congress relied upon § 5 of the Fourteenth Amendment.

I. Historical Review

I think a brief historical review of the key statutory provisions involved in this appeal will be helpful to understanding my dissent. The Fair Labor Standards Act (codified as amended at 29 U.S.C. §§ 201-219) (hereinafter the FLSA) as originally enacted in 1938, contained a section defining congressional findings and declaration of policy (§ 202); a section defining various terms (§ 203); a section fixing the minimum wage for various categories of employees (§ 206); a section defining the maximum number of hours in a work week and providing for payment at a higher rate for hours worked in excess of that maximum (§ 207); a section defining child labor limitations (§ 212); a section defining various exemptions from coverage (§ 213); a section defining prohibited acts (§ 215); a section defining penalties and methods of recovery (§ 216); and a section defining various injunctive proceedings (§ 217). It should be noted that § 202 is still in place and is an express and explicit statutory statement by Congress of its findings of adverse impacts on interstate commerce and its express declaration that it was exercising its power to regulate commerce among the states in order to eliminate these adverse conditions. There is no need therefore to explore the legislative history of FLSA on the issue of what constitutional power Congress relied upon in enacting it. It should also be noted that at the time of its original passage, the FLSA expressly excluded a state as being within the definition of "employer" and excluded "state employees" as being included within the definition of employees. It seems absolutely clear to me, therefore, that at the time of its original enactment, the FLSA was an exercise of the powers of Congress under the Interstate

Commerce Clause, Article 1 Section 8 of the United States Constitution.

In 1963, Congress enacted the "Equal Pay Act of 1963", which amended 29 U.S.C. § 206 of the FLSA by adding thereto a new subsection (d). This amendment to § 206 of the FLSA was set forth in § 3 of the Equal Pay Act of 1963. Section 2 of the Equal Pay Act of 1963 contains express findings by Congress that the existence "of wage differentials based on sex" caused various negative impacts on industries engaged in commerce or in the production of goods for commerce; and contains an express declaration by Congress that it was exercising "its power to regulate commerce among the states" to correct these adverse impacts. Just as in the case of the enactment of the FLSA itself, it seems uncontrovertible to me that in enacting the Equal Pay Act of 1963 which added new subsection (d) to § 206 of the FLSA, Congress was acting pursuant to its Interstate Commerce Clause powers to remedy specific adverse effects on interstate commerce caused by "wage differentials based on sex." In the House Report regarding the Equal Pay Act of 1963, the Committee on Education and Labor makes the following comments as to the purpose and major provisions of the bill that became the Equal Pay Act of 1963:

> The bill (H.R.6060) would add one additional fair labor standard to the act; namely, the employees doing work should be paid equal wages, regardless of sex.
>
> Because of the long history and experience of Government and business and workers with the Fair Labor Standards Act, a simple expansion of that act to include the equal pay concept offers the most efficient and least difficult course of action.
>
> . . . .
>
> Such utilization serves two purposes: First, it eliminates the need for a new bureaucratic structure to enforce equal pay legislation; and second, compliance should be made easier

> because both industry and labor have a long- established familiarity with existing fair labor standards provisions.
>
> Perhaps the most worthy result in this approach is in the question of coverage. This bill neither extends nor curtails coverage of the Fair Labor Standards Act but simply provides that those employers and employees who are presently covered by that act shall be covered by the new provisions relating to equal pay for equal work, regardless of sex.

H.R.Rep. No. 88-309, at 1-2 (1963), *reported in* 1963 U.S.C.C.A.N. 687, 687-89.

The text of new subsection (d) of § 206 expressly provides that the new equal pay for equal work standard will apply to an "employer having employees subject to any provisions of this section [§ 206]." As a result, an employer who is not obligated to pay the minimum wage specified under § 206 is not obligated to comply with the equal pay for equal work provision. Finally, I would point out that in 1963 at the time of enactment of the Equal Pay Act of 1963, under the express terms of the FLSA, the term "employer" did not include a state and the term "employee" did not include a state employee.

The final source of congressional action that must be considered in resolving the issues in this appeal is the Act entitled "Fair Labor Standards Amendments of 1974" [hereinafter "1974 Act"], Pub.L. No. 93-259, 88 Stat. 53. The 1974 Act consists of 29 separate sections covering 25 pages. Section 1 of the 1974 Act simply provides the name by which the Act may be cited and states that unless otherwise expressly specified any reference to an amendment or repeal refers to sections or provisions of the Fair Labor Standards Act of 1938 (29 U.S.C. §§ 201-219). Section 29 of the 1974 Act provides for effective date and implementation by the Secretary of Labor. Section 28 of the 1974 Act makes various amendments to the text of the Age Discrimination in Employment Act of 1967, 29

U.S.C. § 630 et seq. These changes in § 28 are the source of the controversies in the Supreme Court's recent decision in *Kimel v. Florida Board of Regents*, 528 U.S. 62, 120 S.Ct. 631, 145 L.Ed.2d 522. Section 2 through § 27, therefore, are the portions of the 1974 Act that make changes in and additions to the Fair Labor Standards Act of 1938. The most relevant changes to our decision here in *Siler-Khodr* are:

> (a) Section 6(a)(1) of the 1974 Act which made various changes to the statutory definitions in § 203 of the FLSA so as to: (1) include a new defined term of "public agency" which includes "a state or a political subdivision of a state"; (2) amends the term "employer" to include "a public agency"; and (3) defines the term "employee" to include "an employee of a public agency except those who are covered by civil service or who hold a public elective office."
>
> (b) Section 6(d)(1) of the 1974 Act which changes the second sentence of § 16(b) [29 U.S.C. § 216(b)] to read as follows:
>
> > Action to recover such liability may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.

This change was made to satisfy the holding of the Supreme Court in *Employees of Department of Health of Missouri v. Missouri*, 411 U.S. 279, 93 S.Ct. 1614, 36 L.Ed.2d 251, which was decided in April 1973, just about one year prior to the issuance of the committee report. In this suit, various employees of the State of Missouri's health facilities and agencies brought suit in the federal district court for overtime pay due them under § 16(b) of the FLSA. The district court dismissed the suit as being an unconsented action against the State of Missouri barred by the Eleventh Amendment, and the Court of Appeals affirmed. The Supreme Court held that although amendments to the FLSA in 1966 extended statutory coverage to state employees in hospitals, the legislative history

failed to show a congressional purpose to deprive the state of its constitutional immunity to suit in a federal forum by employees of its non-profit institutions because § 16(b) of the FLSA as it existed at that time did not expressly authorize suit by a state employee against the state in federal court. This amendment to § 16(b) of FLSA satisfies one of the grounds upon which the Supreme Court in *Employees v. Missouri* held that "Congress did not lift the sovereign immunity of the states under the FLSA." But even so, some other statements by the *Employees* Court are worth noting, as follows:

> Where employees in state institutions not conducted for profit have such a relation to interstate commerce that national policy, of which Congress is the keeper, indicates that their status should be raised, Congress can act. And when Congress does act, it may place new or even enormous fiscal burdens on the States. Congress acting responsibly would not be presumed to take such action silently . . . .
>
> But we have found not a word in the history of the 1966 amendments to indicate a purpose of Congress to make it possible for a citizen of that State or another State to sue the State in the federal courts . . . . It is not easy to infer that Congress in legislating pursuant to the Commerce Clause, which has grown to vast proportions in its applications, desired silently to deprive the States of an immunity they have long enjoyed under another part of the Constitution . . . .
>
> . . . In this connection, it is not amiss to note that § 16(b) allows recovery by employees, not only of the amount of unpaid wages but of an equal amount as liquidated damages and attorneys' fees. It is one thing, as in *Parden [v. Terminal Ry. of Alabama State Docks Dept.*, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964)*]*, to make a state employee whole; it is quite another to let him recover double against a State. Recalcitrant private employers may be whipped into line in that manner. But we are reluctant to believe that

> Congress in pursuit of a harmonious federalism desired to treat the States so harshly.
>
> 93 S.Ct. at 1618-19.
>
> (c) In § 7 of the 1974 Act, various changes in sections of the FLSA were made in order to bring "domestic service workers" under the provisions of that Act. Of these changes the most significant to our current analysis is the change made by § 7(a) of the 1974 Act, which inserts the following new sentence in § 202(a) of the FLSA: "That Congress further finds that the employment of persons in domestic service in households affects commerce." This change clearly indicates to me that Congress thought about the subject, and the basis of authority, of what changes, if any, it needed to make in § 202 of the FLSA, the section that sets forth its statements of effects on interstate commerce justifying its exercise of the power to regulate commerce.

While it is true that the 1974 Act, unlike the FLSA and the Equal Pay Act of 1963, does not contain express and explicit language regarding impacts on interstate commerce and that the Act was an exercise of the interstate commerce power, I think it is sheer speculation to conclude as the panel majority does, and as the panel in *Ussery v. Louisiana*, 150 F.3d 431 (5th Cir.1998) did, that Congress acted on the basis of some other power in enacting the 1974 Act. In the first place, as mentioned earlier, the amendment of § 202 of the FLSA relating to the inclusion of domestic service workers under the FLSA, clearly indicates that Congress continued to believe that its authority for the adoption of the FLSA was its interstate commerce power. But equally, if not more persuasive, is the fact that the House Education and Labor Committee Report specifically indicates that Congress was acting under its interstate commerce power. *See* H.R.Rep. No. 93-913 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811. In the opening paragraph of this report, the Committee quoted verbatim § 202 of the FLSA to indicate the

basic policy of the FLSA. The Committee report then states under the heading "Purpose of the Legislation" as follows:

> The bill seeks to implement the policy of the Act [the FLSA] by (1) providing an increase in the minimum wage rate, and (2) extending the benefits and protection of the Act to workers engaged in commerce, or in the production of goods for commerce or employed in enterprises engaged in commerce or in the production of goods for commerce.

Id. Later on in this same section of the Committee report, there is a very cursory reference: "The bill extends the minimum wage and overtime coverage of the Act to Federal, State and local government employees . . .." *Id.* Later on in the report in a section-by-section discussion of the main provisions of the bill, the report states:

> Sec. 6. Federal and State Employees.—Amends definitions of the act to permit the extension of minimum wage and overtime coverage to Federal, State, and local public employees.

Id. Later on in this report, there is a two-page discussion of § 6 of the bill, which would extend "minimum wage and overtime coverage to about five million nonsupervisory employees in the public sector not now covered by the Act." *Id.* In this discussion, there is no specific reference to the "equal pay for equal work" provisions of subsection (d) of § 206; there is no reference to "discrimination on the basis of sex" by the states against their employees; there is no reference to unconstitutional state laws that foster discrimination in pay on the basis of sex; there is no reference to states denying equal protection of the laws because of wage rates differing on the basis of sex; and finally there is no discussion or finding by the Committee that pay differentials on the basis of sex between workers doing the same job for the states requires exercise by the Congress of its powers under § 5 of the Fourteenth Amendment. There is a lengthy portion of this report which constitutes an overview of the history of the FLSA and various Supreme Court decisions relating thereto. Since this committee report was issued in March 1974, it is not surprising that

this historical review of the Act and Supreme Court decisions generally arrives at the conclusion that the Congress has the power under the Interstate Commerce Clause to make the extension of the Fair Labor Standards Act to state employees as contemplated by the 1974 Act. This discussion focused primarily on the Supreme Court decision in *Maryland v. Wirtz*, 392 U.S. 183, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968). One of the issues involved in *Wirtz* was whether or not the state's sovereign immunity was abrogated by certain amendments made in 1966 that extended wage and hour coverage to employees of hospitals, mental institutions, schools, and institutions of higher education regardless of whether these institutions were public or private or operated for profit or not for profit. While affirming the lower court's decision not to enjoin enforcement of these provisions, the Supreme Court in *Wirtz* expressly reserved for later determination all questions of the state's sovereign immunity from suit guaranteed by the Eleventh Amendment.

In light of the foregoing, I come to the following conclusions:

1. In adopting the FLSA and the Equal Pay Act of 1963, Congress expressly and explicitly, in the statutes themselves, relied upon its powers under the Interstate Commerce Clause of the Constitution.

2. In passing the 1974 Act, Congress acted under its authority under the Interstate Commerce Clause. While this conclusion is not as express and as explicit as that regarding the FLSA and the Equal Pay Act of 1963, there is overwhelming evidence upon which to draw such a conclusion, and there is no evidence that would support a contrary conclusion.

3. From my review of the statutory language in each of these legislative enactments and their respective legislative histories, I can see absolutely no basis for treating the provisions of § 206(d) separately and apart from the remainder of the Fair Labor Standards

Act for purposes of determining the constitutional power upon which Congress purported to act.

I disagree completely with my colleagues in the majority who relied upon the prior opinion of this Court in *Ussery*, which relied upon prior opinions of other Circuit Courts, in attributing some sort of separate standing to the Equal Pay Act for purposes of determining its constitutionality. Once the bill which was labeled as the Equal Pay Act of 1963 was passed and its substantive amendment to § 206(d) incorporated in the U.S.Code, it became for all purposes and intents a portion of the Fair Labor Standards Act just as though it had been in the original Act. In truth and in fact, the provisions of subsection (d) of § 206 could not be applied in any case without simultaneous reference to the other subsections of § 206, the definitions in § 203, the exemptions in § 213, and the remedies available in § 216.

II. The Impact of Seminole Tribe

No satisfactory disposition of the case now before us can be accomplished without giving full application to the decision of the Supreme Court in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). In *Seminole Tribe*, the Supreme Court made two holdings that control in this case. First and foremost, the Supreme Court overruled its prior decision in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989), in which a plurality of the Supreme Court held that Congress had the power under the Interstate Commerce Clause to abrogate the immunity that a State claims under the Eleventh Amendment from suits by private individuals for money damages. After stating "[w]e feel bound to conclude that *Union Gas* was wrongly decided and that it should be, and now is, overruled," the Court went on to state:

> [W]e reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area,

> like the regulation of Indian commerce, that is under the exclusive control of the Federal Government . . . .The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction. Petitioner's suit against the State of Florida must be dismissed for a lack of jurisdiction.

Seminole Tribe, 116 S.Ct. at 1131-32. The Act in question in this case was the Indian Gaming Regulatory Act, which imposed upon the states a duty to negotiate in good faith with an Indian tribe toward the formation of a compact and authorized a tribe to bring suit in federal court against a state in order to compel performance of that duty. The Supreme Court determined that the language of the Act was sufficient to indicate Congress' clear intent to abrogate the state's sovereign immunity; notwithstanding that determination, the Court concluded that the Indian Commerce Clause of the Constitution does not grant Congress that power. After making the "intention" determination, the Supreme Court said its inquiry was focused on one question: "Was the Act in question passed pursuant to a constitutional provision granting Congress the power to abrogate?" *Id.* at 1125.

In my view, this precise question rephrased to fit the circumstances of this case is the determinative issue for this Court. That question is "Was the 1974 Act passed pursuant to a constitutional provision granting Congress the power to abrogate?" That question involves two subordinate questions as follows:

a. Under what provision of the Constitution was the 1974 Act passed; and

b. Does that constitutional provision grant Congress the power to abrogate the state's Eleventh Amendment immunity from suit?

For the reasons stated earlier in this dissent, I have no trouble at all concluding that the 1974 Act was passed pursuant to Congress'

powers under the Interstate Commerce Clause. And in my view, the answer to the second subquestion is controlled by *Seminole Tribe* and must be "no". Answers to these questions are strictly factual determinations to be made on the basis of the statutory text and the legislative history as of the time of "passage" or "enactment" of the Act in question. I make this point expressly because I disagree with the panel majority's reliance on our prior decision in *Ussery*, which relied on an Eighth Circuit case and stated:

> *Seminole Tribe* "requires us to make an objective inquiry, namely whether Congress *could have* enacted the legislation at issue pursuant to a constitutional provision granting it the power to abrogate." (Emphasis added.)

150 F.3d at 436 (quoting *Crawford v. Davis*, 109 F.3d 1281, 1283 (8th Cir.1997)). But this "could of, would of, should of" concept is totally inconsistent with the language of *Seminole Tribe*. The question posed in *Seminole Tribe* does not say "could the Act in question have been passed pursuant to any constitutional provision granting Congress the power to abrogate"? In *Seminole Tribe*, the Supreme Court determined that the Act in question (the Indian Gaming Regulatory Act) was passed pursuant to the constitutional provision authorizing Congress to "regulate commerce with Indian tribes," but that "Congress does not have the authority under the Constitution to make the State suable in federal court...." 116 S.Ct. at 1133. Furthermore, the Court in *Seminole Tribe* went on to state:

> Nor are we free to rewrite the statutory scheme in order to approximate what we think Congress might have wanted had it known that § 2710(d)(7) was beyond its authority. If that effort is to be made, it should be made by Congress, and not by the federal courts.

Id. The majority opinion in *Seminole Tribe* does not get into any speculation as to whether § 5 of the Fourteenth Amendment could have provided the constitutional authority for the abrogation of states' Eleventh Amendment immunity which Congress proposed

in the Indian Gaming Regulatory Act. I think that it is a mistake and an erroneous application of Supreme Court precedent for the majority to go through the convoluted, semantical speculations as set forth in their opinion to come up with their conclusion that § 5 of the Fourteenth Amendment supports the abrogation of state immunity from private suits for money damages insofar as claims under 29 U.S.C. § 206(d) are concerned. Accordingly, I would vacate the portions of the judgment awarding damages under the Equal Pay Act.

Theresa M. SILER-KHODR, Plaintiff-Appellee,

v.

THE UNIVERSITY OF TEXAS HEALTH SCIENCE CENTER SAN ANTONIO, et al., Defendants,

The University of Texas Health Science Center San Antonio, Defendant-Appellant.

No. 00-50092.

United States Court of Appeals, Fifth Circuit.

May 16, 2002.

On Appeal from the United States District Court for the Western District of Texas

ON PETITION FOR REHEARING EN BANC

Before POLITZ, DeMOSS and STEWART, Circuit Judges.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The court having been polled at the request of one of the members of the court, and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. 35 and 5th Cir. R. 35), the petition for rehearing en banc is DENIED.

JERRY E. SMITH, Circuit Judge, with whom DeMOSS, Circuit Judge, joins, dissenting from the denial of rehearing en banc:

I respectfully dissent from the court's failure to grant en banc reconsideration in this important case. As a result of this failure, we have lost an opportunity to bring our Eleventh Amendment

jurisprudence into conformity with the Supreme Court's recent caselaw.

I.

In affirming a judgment under the Equal Pay Act ("EPA"), the panel majority rejected Texas's argument that application of the EPA to a state university violates the Eleventh Amendment. *Siler-Khodr v. Univ. of Tex. Health Sci. Ctr. San Antonio*, 261 F.3d 542 (5th Cir.2001). Irrespective of whether particular judges like it, however, the Supreme Court has been giving more and more Eleventh Amendment protection to the states. The panel majority opinion takes no account of that trend.

The majority decision is inconsistent with the Supreme Court's Eleventh Amendment jurisprudence in two significant respects. First, as Judge DeMoss's dissent ably demonstrates, there is no indication that, when it enacted the EPA, Congress sought to invoke its powers under section 5 of the Fourteenth Amendment. *See Siler-Khodr*, 261 F.3d at 551-58 (DeMoss, J., dissenting in part, concurring in part). Because Congress almost certainly relied solely on its powers under the Commerce Clause, the EPA cannot pierce the states' sovereign immunity.

Second, even if Congress did properly invoke its section 5 powers, the EPA fails the "congruence and proportionality" test, which requires that section 5 legislation not be "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *City of Boerne v. Flores*, 521 U.S. 507, 520, 531, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). Although section 5 does give Congress the power to enact "prophylactic" legislation that prohibits conduct going beyond that which in itself violates the Equal Protection Clause, section 5 legislation is unconstitutional if it "prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal

protection . . . standard." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 86, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000).

If the majority opinion were written on a blank slate, it would be even easier for me to urge en banc reconsideration followed by reversal. Appropriately, the majority relied in part on the fact that the constitutionality of the EPA has been upheld by five other circuits[1] and in *Ussery v. Louisiana*, 150 F.3d 431 (5th Cir.1998). It is significant, however, that after deciding *Kimel*, the Court vacated and remanded two circuits' opinions upholding the EPA.[2] The Court has not yet granted certiorari in any of the cases upholding the EPA since *Kimel*, but it seems likely that it does not regard the issue as settled and is only awaiting the emergence of a circuit split. Also, importantly, the Court has rejected only one relevant certiorari petition since *Kimel*.[3]

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1. *See Varner v. Ill. State Univ.*, 226 F.3d 927 (7th Cir.2000) ("*Varner II*"), *cert. denied*, 533 U.S. 902, 121 S.Ct. 2241, 150 L.Ed.2d 230 (2001); *Kovacevich v. Kent State Univ.*, 224 F.3d 806, 819- 21 (6th Cir.2000); *Hundertmark v. Fla. Dep't of Transp.*, 205 F.3d 1272, 1274 (11th Cir.2000); *O'Sullivan v. Minnesota*, 191 F.3d 965, 968 (8th Cir.1999); *Anderson v. State Univ.*, 169 F.3d 117 (2d Cir.1999), *vacated and remanded*, 528 U.S. 1111, 120 S.Ct. 929, 145 L.Ed.2d 807 (2000).

2. *See Anderson v. State Univ.*, 169 F.3d 117 (2d Cir.1999), *vacated and remanded*, 528 U.S. 1111, 120 S.Ct. 929, 145 L.Ed.2d 807 (2000); *Varner v. Ill. State Univ.*, 150 F.3d 706 (7th Cir.1998) ("*Varner I*"), *vacated and remanded*, 528 U.S. 1110, 120 S.Ct. 928, 145 L.Ed.2d 806 (2000).

3. *See Varner II*.

II.

A.

In enacting the EPA, Congress failed to invoke its powers under section 5. "Because such legislation imposes congressional policy on a state involuntarily, and because it often intrudes on traditional state authority, we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 16, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981). An intent to invoke section 5 powers cannot be attributed to an act that "nowhere states that is its purpose" and where such a purpose is not evident from the legislation's "language and structure" or legislative history. *Id.* at 17, 101 S.Ct. 1531. For the reasons well laid out in Judge DeMoss's dissent, there is no indication that Congress sought to use its section 5 powers–and there is a great deal of evidence that it sought to use its powers under the Commerce Clause–when it enacted the 1974 amendments to the EPA extending it to cover the states. *Siler-Khodr*, 261 F.3d at 551-55 (DeMoss, J., dissenting).

Although the plaintiff may be right in supposing that Congress need not explicitly invoke section 5 in the text of the statute,[4] there must be at least some significant indication--in the text, structure, or legislative history--that it sought to use its section 5 powers. Congress cannot rely on section 5 without *any* indication that it intended to do so.

Very recently, the Court specifically refused to consider section 5 as a justification for the constitutionality of a statute where

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4. *See EEOC v. Wyoming*, 460 U.S. 226, 243 n. 18, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983) (holding that to invoke its § 5 powers, Congress need not "anywhere recite the words 'section 5' or 'Fourteenth Amendment' or 'equal protection'").

"[t]here is no suggestion in the language of the statute itself, or in the House or Senate Reports of the bill which became the statute that Congress had in mind" its Fourteenth Amendment powers. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 642 n. 7, 119 S.Ct. 2199, 144 L.Ed.2d 575 (1999).[5] Even in *EEOC v. Wyoming*, 460 U.S. 226, 243 n. 18, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983), a decision heavily relied on by the plaintiff and by the United States as intervenor, the Court noted that "[i]t is in the nature of our review of congressional legislation defended on the basis of Congress's powers under Section 5 of the Fourteenth Amendment that we be able to discern some legislative purpose or factual predicate that supports the exercise of that power."

Although Supreme Court precedent may be equivocal as to *how much* indication of congressional intent is necessary to invoke section 5 properly, there is little doubt after *Florida Prepaid* that at least *some* such indication is required. The EPA does not meet even this minimal standard.

B.

The panel majority did not have the benefit of *Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 122 S.Ct. 999, 152 L.Ed.2d 27 (2002), when it issued its opinion. This new decision is further indication of the Supreme Court's increasing receptiveness to Eleventh Amendment arguments and reinforces my concerns about the panel majority's result and reasoning. *Raygor* holds, in an Eleventh Amendment sovereign immunity case, that "insofar as statutory intent was ambiguous, we [will] not 'attribute to Congress an intent to intrude on state governmental functions

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5. *See also Chavez v. Arte Publico Press*, 204 F.3d 601, 604 (5th Cir.2000) (acknowledging that *Florida Prepaid* has clarified Supreme Court precedent on this point).

regardless of whether Congress acted pursuant . . . to § 5 of the Fourteenth Amendment.'" *Id.* at 1007 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 470, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991)) (emphasis added). In such cases, "it is not relevant whether Congress acted pursuant to § 5." *Id.* at 1007-08.

The specific context of *Raygor* was statutory ambiguity over whether Congress had intended to abrogate state sovereign immunity at all. The Court's reasoning, however, is also applicable to the question whether Congress sought to invoke section 5. This conclusion is required by *Raygor*'s emphatic statement that "[w]hen Congress intends to alter the usual balance between the States and the Federal Government, it must make its intention to so unmistakably clear in the language of the statute" to ensure that "the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision" of an important question of constitutional law. *Id.* at 1006 (citations omitted). Obviously, we cannot ensure that Congress faced the critical issue of the scope of its section 5 powers in the process of enacting the EPA if there is no indication that it sought to invoke those powers at all.

Raygor does not resolve the question of how strong an indication of congressional intent is required; but it certainly holds that at least *some* is necessary. Because the regulation of state employees by the Equal Pay Act undeniably "intrude[s] on state governmental functions" and "alter[s] the usual balance between the States and the Federal Government," *Raygor* strongly suggests that there must be at least minimal indication that Congress sought to invoke its powers under section 5. *Id.* at 1006, 1007.

III.

Even if Congress did properly invoke its powers under section 5, the EPA fails the test of congruence and proportionality. "Congress can enact broad prophylactic legislation that prohibits

conduct that is *constitutional* only when there is a 'congruence and proportionality between the injury to be remedied and the means adopted to that end.'" *Kazmier v. Widmann*, 225 F.3d 519, 524 (5th Cir.2000) (quoting *Kimel*, 528 U.S. at 86, 120 S.Ct. 631). A statute cannot be justified under section 5 if it "prohibits substantially more state employment decisions and practices" than are themselves unconstitutional. *Kimel*, 528 U.S. at 86, 120 S.Ct. 631; *see also Kazmier*, 225 F.3d at 524 (same).

If the EPA is to be justified at all under section 5, it must be as a remedial measure aimed at eradicating unconstitutional sex discrimination. It is well established that the Equal Protection Clause forbids only intentional sex discrimination. *Personnel Adm'r v. Feeney*, 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979). Moreover, unconstitutional "[d]iscriminatory purpose . . . implies more than intent as volition or intent as awareness of consequences . . . . It implies that the decisionmaker ... selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects on an identifiable group." *Id.* at 279, 99 S.Ct. 2282 (quotation omitted).

Unfortunately, the EPA goes far beyond forbidding intentional sex discrimination. One circuit has described it as a "strict liability" statute under which "no intent to discriminate need be shown." *Fallon v. Illinois*, 882 F.2d 1206, 1213 (7th Cir.1989). "Unlike the showing required under Title VII's disparate treatment theory, proof of discriminatory intent is not required to establish a prima facie case under the Equal Pay Act." *Peters v. City of Shreveport*, 818 F.2d 1148, 1153 (5th Cir.1987).[6] Thus, there is a strong likelihood

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6. In *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000), the Court relaxed somewhat the standards for disparate treatment liability under title VII, but it explicitly reaffirmed the fundamental principle that "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated

that the EPA "prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection . . . standard." *Kimel*, 528 U.S. at 86, 120 S.Ct. 631.

The four affirmative defenses to a *prima facie* case available under the EPA do not eliminate the danger that it can be used to prohibit an excessively large amount of constitutional conduct. Once the plaintiff establishes a *prima facie* case, these defenses allow the defendant to justify the challenged earnings disparity if it is a result of "(1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; (4) any other factor other than sex." *Fallon*, 882 F.2d at 1211 (citing 29 U.S.C. § 206(d)(1) (1994)). Although these four categories (and particularly the catch-all last one) seem comprehensive, there are likely to be many cases in which none of them applies even in the absence of intentional, unconstitutional sex discrimination.

There may be numerous instances in which an employment decision was made as a result of difficult-to-articulate intuitive factors that cannot be affirmatively proven by evidence strong enough to refute a *prima facie* case under the EPA. In practice, the reasoning underlying an employment decision may be difficult or impossible to document at trial. Moreover, even where sex was the determining factor in a particular decision, it may not have been the result of "a . . . course of action [adopted] at least in part 'because

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against the plaintiff remains at all times with the plaintiff." *Id.* at 143, 120 S.Ct. 2097 (internal citations omitted). Thus, a decision striking down the EPA as applied to the states does not imply that the application of title VII to state employers is constitutionally suspect. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976) (upholding the constitutionality of the 1972 amendments to title VII that extend it to state employers).

of,' not merely 'in spite of,' its adverse effects on" women. *Feeney*, 442 U.S. at 279, 99 S.Ct. 2282.

State agencies may adopt pay scales that have the effect of paying women less than men without doing so "*because of*" their "adverse effects" on women. *Id.* (emphasis added). The requirement that the defendant state affirmatively prove not only its lack of a discriminatory intent but also the existence of a valid alternative ground for its decision ensures that a substantial amount of constitutional state action will run afoul of the EPA.

Previous Supreme Court cases upholding a burden-shifting provision under section 5 have done so only in cases in which the governmental entity had a long history of intentional discrimination, or where the specific challenged policy had a history of abuse as a pretext for discrimination.[7] By contrast, the EPA does not require any proof that the defendant has a history of intentional discrimination, nor does it limit its scope to employment practices that routinely have served as tools of intentional discrimination. It therefore falls short of the congruence and proportionality requirement the Supreme Court has imposed on section 5 legislation.

Our Eleventh Amendment jurisprudence in this area needs to be squared with recent and emerging Supreme Court law.

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7. *See, e.g., City of Boerne*, 521 U.S. at 533, 117 S.Ct. 2157 (surveying and summarizing these cases); *City of Rome v. U.S.*, 446 U.S. 156, 177, 100 S.Ct. 1548, 64 L.Ed.2d 119 (1980) (upholding preclearance requirements imposed by the Voting Rights Act because they are limited to jurisdictions with a "demonstrable history of intentional racial discrimination"); *South Carolina v. Katzenbach*, 383 U.S. 301, 330, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966) (upholding Voting Rights Act ban on voting tests "because of their long history as a tool for perpetrating evil").

Accordingly, I respectfully dissent from the denial of rehearing en banc.

[Filed January 7, 2000]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

THERESA M. SILER-KHODR	§	
Plaintiff,	§	
	§	
v.	§	**NO. SA-97-CA-1250**
	§	
UNIVERSITY OF TEXAS	§	
HEALTH SCIENCE CENTER	§	
AT SAN ANTONIO	§	
Defendant.	§	

JUDGMENT

On the 20th day of September, 1999, the Court called to trial the above-referenced and captioned matter of *Theresa M. Siler-Khodr v. University of Texas Health Science Center at San Antonio*. The Plaintiff, Dr. Siler-Khodr, was represented by her counsel of record, Joseph Y. Ahmad, Esquire, and Andrew S. Golub, Esquire. The Defendant was represented by counsel of record, Martin Thompson, Esquire, and Kathlyn Wilson, Esquire, each being an Assistant Attorney General of the State of Texas. An eight member jury was empaneled, opening statements were given, and approximately thirteen hours of testimony followed.

The Court then prepared instructions to the jury along with special interrogatories, which were read to the jury on Friday, September 24, 1999. The parties argued their respective cases to the jury, whereupon the jury retired and deliberated for approximately five hours.

The following Special Interrogatories were submitted to the jury, and the jury provided the answers as indicated:

SPECIAL INTERROGATORY #1:

Do you find that the Plaintiff has proven by a preponderance of the evidence that her sex was a motivating factor in the decisions of the Defendant regarding her compensation for her employment at the University of Texas Health Science Center at San Antonio?

Answer "Yes" or "No."

ANSWER: **YES**

SPECIAL INTERROGATORY #2

Please state what amount of damages, if any, the Plaintiff has proved that she is entitled to receive for her Title VII claim.

Answer in dollars and cents, if any.

ANSWER: **$20,000**

SPECIAL INTERROGATORY #3

Do you find by a preponderance of the evidence that the Defendant violated the Equal Pay Act by paying the Plaintiff less than a male employed at a job which is substantially equal to Plaintiff's work?

Answer "Yes or No."

ANSWER: **YES**

SPECIAL INTERROGATORY #4

Has the Defendant proved by a preponderance of the evidence that the wage disparity was:

(a) based upon a merit system?

ANSWER: (Yes or NO): **NO**

(b) based upon a system which measures earnings by quality of production?

ANSWER: (Yes or NO): **NO**

(c) based upon a factor other than sex?

ANSWER: (Yes or NO): **NO**

SPECIAL INTERROGATORY #5

Do you find by a preponderance of the evidence that Defendant's violation of the Equal Pay Act was willful as defined in these instructions in paragraph 54 on page 14?

Answer "Yes" or "No."

ANSWER: **YES**

SPECIAL INTERROGATORY #6

If you find the Plaintiff proved by a preponderance of the evidence that she should be entitled to an award of damages incurred as a result of the Defendant's violation of the Equal Pay Act, please state what amount the Plaintiff proved she should receive.

Answer in dollars and cents, if any.

ANSWER: **$91,000**

SPECIAL INTERROGATORY #7

If you find from a preponderance of the evidence that the Defendant took adverse employment action against the Plaintiff, was that adverse employment action taken because of the Defendant's knowledge of the Plaintiff's protected activity?

Answer "Yes" or "No."

ANSWER: **NO**

SPECIAL INTERROGATORY #8

If you find the Plaintiff proved by a preponderance of the evidence that she should be entitled to an award of damages incurred as a result of the Defendant's retaliation against her in violation of the Equal Pay Act and Title VII, please state what amount the Plaintiff proved she should receive?

Answer in dollars and cents, if any.

ANSWER: **N/A**

Based upon the jury's answer to the Special Interrogatories, the Court hereby

ORDERS, ADJUDGES and **DECREES** as follows:

1. **JUDGEMENT IS ENTERED IN PLAINTIFF'S FAVOR** with respect to her claim of gender discrimination under Title VII of the Civil Rights Act of 1964. Pursuant to the Court's authority under 42 U.S.C. § 2000e-5(g), the Court awards back pay in the amount of $91,000. In accordance with the jury's finding that Plaintiff has incurred $20,000 in compensatory damages, the Court additionally awards compensatory damages in that amount pursuant to its authority under 42 U.S.C. § 1981a(b). Under the Court's authority under 42 U.S.C. § 2000e-5(g), the Court also finds that Plaintiff is entitled to a grant of equitable relief. It is therefore **ADJUDGED** that Dr. Siler-Khodr's compensation shall be equalized with that of Dr. Sydney Shain's as of September 24, 1999. It is further **ADJDUGED** that Defendant shall pay to Dr. Siler-Khodr all sums that are necessary to accomplish the equalization of her compensation with Dr. Shain retroactive to September 24, 1999.

2. **JUDGMENT IS ENTERED IN THE PLAINTIFF'S FAVOR** with respect to her claim of discrimination under

the Equal Pay Act, 29 U.S.C. § 206(d). In accordance with the jury's finding that Plaintiff has suffered $91,000 in unpaid minimum wages or unpaid overtime compensation under the Equal Pay Act, and under the Court's authority pursuant to 29 U.S.C. §§ 206(d)(3) and 216(b), the Court hereby awards unpaid minimum wages or unpaid overtime compensation in the amount of $91,000.00. However, because the Court has awarded the Plaintiff $91,000 in back pay under Title VII, this award of unpaid minimum wages or unpaid overtime compensation should not be added in totaling the award to the Plaintiff. Also pursuant to the Court's authority under 29 U.S.C. § 216(b), and in accordance with the jury's affirmative finding that the Defendant's violation of the Equal Pay Act was wilful, the Court awrads an additional $91,000 as liquidated damages. The Court further finds that the Plaintiff is entitled to a grant of equitable relief. It is therefore **ADJUDGED** that Dr. Siler-Khodr's compensation shall be equalized with that of Dr. Sydney Shain's as of September 24, 1999. It is further **ADJUDGED** that Defendant shall pay to Dr. Siler-Khodr all sums that are necessary to accomplish the equalization of her compensation with Dr. Shain retroactive to September 24, 1999.

3. **JUDGMENT IS ENTERED IN DEFENDANT'S FAVOR** with respect to the Plaintiff's claims of prohibited retaliation under Title VII, 42 U.S.C. § 2000e-3, and the Equal Pay Act, 29 U.S.C. § 215(a)(3).

4. It is also **ADJUDGED** that the Plaintiff is entitled to recover reasonable attorney's fees under Title VII, 42 U.S.C. § 2000e-5(k), and the Equal Pay Act, 29 U.S.C. § 216(b). These fees are to be taxed as costs in accordance with 42 U.S.C. § 2000e-5(k), and are awarded outright in accordance with 29 U.S.C. § 216(b). Pursuant to Rule

54(d)(2)(A) and (b) of the Federal Rules of Civil Procedure, the Plaintiff shall file and serve a motion for fees within 14 days after entry of this Judgment.

5. The Plaintiff is also entitled to recover costs in addition to the attorney's fees mentioned above. The Plaintiff is therefore **ORDERED** to submit her Bill of Costs, pursuant to Rule 54(d)(1) of the Federal Rules of Civil Procedure, contemporaneously with the filing and service of the aforementioned motion for attorney's fees.

6. It is **ADJUDGED** that Plaintiff is entitled to prejudgment interest on the award of back pay/unpaid minimum wages/unpaid overtime compensation ("back pay") under Title VII and the Equal Pay Act, and on the award of compensatory damages under Title VII. The prejudgment interest in this case is 5.670%, compounded daily, running from January 29, 1995, amounts to $19,963.40 on the $91,000 back pay award, and to $3,728.22, on the $20,000 award of compensatory damages under Title VII.

7. It is **ADJUDGED** that post-judgment interest shall accrue on all unpaid sums under this Judgment, including all costs and attorney's fees awarded, at a rate of 5.670% per annum, compounded annually, from the date of this Judgment's entry until paid in full.

8. All relief not specifically granted herein shall be and is hereby **DENIED.**

SIGNED this 29th day of December, 1999.

/s/ William Wayne Justice
William Wayne Justice
Senior United States District Judge

UNITED STATES CODE ANNOTATED
TITLE 29. LABOR
CHAPTER 8--FAIR LABOR STANDARDS

§ 202. Congressional finding and declaration policy

(a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burden commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce. That Congress further finds that the employment of persons in domestic service in households affects commerce.

(b) It is declared to be the policy of this chapter, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

UNITED STATES CODE ANNOTATED
TITLE 29. LABOR
CHAPTER 8--FAIR LABOR STANDARDS

§ 206. Minimum wage

(a) Employees engaged in commerce; home workers in Puerto Rico and Virgin Islands; employees in American Samoa; seamen on American vessels; agricultural employees

Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) except as otherwise provided in this section, not less than $4.25 an hour during the period ending on September 30, 1996, not less than $4.75 an hour during the year beginning on October 1, 1996, and not less than $5.15 an hour beginning September 1, 1997;

(2) if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Administrator, or his authorized representative, shall have power to make such regulations or orders as are necessary or appropriate to carry out any of the provisions of this paragraph, including the power without limiting the generality of the foregoing, to define any operation

or occupation which is performed by such home work employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term "home worker"; and to prescribe the conditions under which employers, agents, contractors, and subcontractors shall cause goods to be produced by home workers;

(3) if such employee is employed in American Samoa, in lieu of the rate or rates provided by this subsection or subsection (b) of this section, not less than the applicable rate established by the Secretary of Labor in accordance with recommendations of a special industry committee or committees which he shall appoint pursuant to sections 205 and 208 of this title. The minimum wage rate thus established shall not exceed the rate prescribed in paragraph (1) of this subsection;

(4) if such employee is employed as a seaman on an American vessel, not less than the rate which will provide to the employee, for the period covered by the wage payment, wages equal to compensation at the hourly rate prescribed by paragraph (1) of this subsection for all hours during such period when he was actually on duty (including periods aboard ship when the employee was on watch or was, at the direction of a superior officer, performing work or standing by, but not including off-duty periods which are provided pursuant to the employment agreement); or

(5) if such employee is employed in agriculture, not less than the minimum wage rate in effect under paragraph (1) after December 31, 1977.

(b) Additional applicability to employees pursuant to subsequent amendatory provisions

Every employer shall pay to each of his employees (other than an employee to whom subsection (a)(5) of this section applies) who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this section by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966, title IX of the Education Amendments of 1972 [20 U.S.C.A. § 1681 et seq.], or the Fair Labor Standards Amendments of 1974, wages at the following rate: Effective after December 31, 1977, not less than the minimum wage rate in effect under subsection (a)(1) of this section.

(c) Repealed. Pub.L. 104-188, [Title III], § 2104(c), Aug. 20, 1996, 110 Stat. 1929

(d) Prohibition of sex discrimination

(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter.

(4) As used in this subsection, the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(e) Employees of employers providing contract services to United States

(1) Notwithstanding the provisions of section 213 of this title (except subsections (a)(1) and (f) thereof), every employer providing any contract services (other than linen supply services) under a contract with the United States or any subcontract thereunder shall pay to each of his employees whose rate of pay is not governed by the Service Contract Act of 1965 (41 U.S.C. 351-357) or to whom subsection (a)(1) of this section is not applicable, wages at rates not less than the rates provided for in subsection (b) of this section.

(2) Notwithstanding the provisions of section 213 of this title (except subsections (a)(1) and (f) thereof) and the provisions of the Service Contract Act of 1965 [41 U.S.C.A. § 351 et seq.], every employer in an establishment providing linen supply services to the United States under a contract with the United States or any subcontract thereunder shall pay to each of his employees in such

establishment wages at rates not less than those prescribed in subsection (b) of this section, except that if more than 50 per centum of the gross annual dollar volume of sales made or business done by such establishment is derived from providing such linen supply services under any such contracts or subcontracts, such employer shall pay to each of his employees in such establishment wages at rates not less than those prescribed in subsection (a)(1) of this section.

(f) Employees in domestic service

Any employee—

(1) who in any workweek is employed in domestic service in a household shall be paid wages at a rate not less than the wage rate in effect under subsection (b) of this section unless such employee's compensation for such service would not because of section 209(a)(6) of the Social Security Act [42 U.S.C.A. § 409(a)(6)] constitute wages for the purposes of title II of such Act [42 U.S.C.A. § 401 et seq.], or

(2) who in any workweek—

(A) is employed in domestic service in one or more households, and

(B) is so employed for more than 8 hours in the aggregate,

shall be paid wages for such employment in such workweek at a rate not less than the wage rate in effect under subsection (b) of this section.

(g) Newly hired employees who are less than 20 years old

(1) In lieu of the rate prescribed by subsection (a)(1) of this section, any employer may pay any employee of such employer, during the first 90 consecutive calendar days after such employee is initially employed by such employer, a wage which is not less than $4.25 an hour.

(2) No employer may take any action to displace employees (including partial displacements such as reduction in hours, wages, or employment benefits) for purposes of hiring individuals at the wage authorized in paragraph (1).

(3) Any employer who violates this subsection shall be considered to have violated section 215(a)(3) of this title.

(4) This subsection shall only apply to an employee who has not attained the age of 20 years.

UNITED STATES CODE ANNOTATED
TITLE 29. LABOR
CHAPTER 8--FAIR LABOR STANDARDS

§ 216. Penalties

(a) Fines and imprisonment

Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded

to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

(c) Payment of wages and compensation; waiver of claims; actions by the Secretary; limitation of actions

The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or section 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) of this section to bring an action by or on behalf of any employee to recover the liability specified in the first sentence of such subsection and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections

206 and 207 of this title or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b) of this section, unless such action is dismissed without prejudice on motion of the Secretary. Any sums thus recovered by the Secretary of Labor on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Secretary of Labor under this subsection for the purposes of the statutes of limitations provided in section 255(a) of this title, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action.

(d) Savings provisions

In any action or proceeding commenced prior to, on, or after Aug. 8, 1956, no employer shall be subject to any liability or punishment under this chapter or the Portal-to-Portal Act of 1947 [29 U.S.C.A. § 251 et seq.] on account of his failure to comply with any provision or provisions of this chapter or such Act (1) with respect to work heretofore or hereafter performed in a workplace to which the exemption in section 213(f) of this title is applicable, (2) with respect to work performed in Guam, the Canal Zone or Wake Island before the effective date of this amendment of subsection (d), or (3) with respect to work performed in a possession named in section 206(a)(3) of this title at any time prior to the establishment by the Secretary, as provided therein, of a minimum wage rate applicable to such work.

(e) Civil penalties for child labor violations

Any person who violates the provisions of section 212 or section 213(c)(5) of this title, relating to child labor, or any regulation issued under section 212 or section 213(c)(5) of this title, shall be subject to a civil penalty of not to exceed $10,000 for each employee who was the subject of such a violation. Any person who repeatedly or willfully violates section 206 or 207 of this title shall be subject to a civil penalty of not to exceed $1,000 for each such violation. In determining the amount of any penalty under this subsection, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. The amount of any penalty under this subsection, when finally determined, may be—

(1) deducted from any sums owing by the United States to the person charged;

(2) recovered in a civil action brought by the Secretary in any court of competent jurisdiction, in which litigation the Secretary shall be represented by the Solicitor of Labor; or

(3) ordered by the court, in an action brought for a violation of section 215(a)(4) of this title or a repeated or willful violation of section 215(a)(2) of this title, to be paid to the Secretary.

Any administrative determination by the Secretary of the amount of any penalty under this subsection shall be final, unless within fifteen days after receipt of notice thereof by certified mail the person charged with the violation takes exception to the determination that the violations for which the penalty is imposed occurred, in which event final determination of the penalty shall be made in an administrative proceeding after opportunity for hearing in accordance with section 554 of Title 5, and regulations to be promulgated by the Secretary. Except for civil penalties collected for violations of section 212 of this title, sums collected as penalties pursuant to this section shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting

such penalties, in accordance with the provisions of section 9a of this title. Civil penalties collected for violations of section 212 of this title shall be deposited in the general fund of the Treasury.

(2)
Supreme Court, U.S.
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No. 02-0253

In The

Supreme Court of the United States

THE UNIVERSITY OF TEXAS HEALTH SCIENCE CENTER AT SAN ANTONIO,

Petitioner,

v.

THERESA M. SILER-KHODR,

Respondent,

and

THE UNITED STATES OF AMERICA,

Intervenor-Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

All circuit courts that have considered the Equal Pay Act's constitutionality under the Eleventh Amendment, including opinions since 1996, have been unanimous: the statute accords with this Court's Eleventh Amendment jurisprudence. Not only do the circuits agree, but this Court recently indicated a disinclination to review the Equal Pay Act, having denied certiorari on this same question in *Varner v. Illinois State Univ.*, 226 F.3d 927 (7th Cir. 2000), *cert. denied*, 533 U.S. 902 (2001) ("*Varner II*"). The unanimous approach of the circuits, as well as the recent denial of certiorari in *Varner II*, speaks directly to the Petitioner's assertion that there exists a conflict between the extant case law and this Court's Eleventh Amendment holdings. To the contrary, the circuit courts have assiduously taken those holdings into account, including in the *Varner* litigation where this Court had vacated the original panel opinion for reconsideration in light of *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000). Put simply, there exists neither a conflict among the circuits, or a conflict between their judgments and the law established by this Court. There is no basis under Rule 10(c) of this Court's rules to grant certiorari.

Moreover, even if this Court were inclined to determine whether the Equal Pay Act is constitutional, this case is not the proper vehicle. Last term, this Court held that states waive Eleventh Amendment immunity when they remove cases to federal court. *Lapides v. Board of Regents of the University System of Georgia*, 122 S.Ct. 1640 (2002). This is a removed case. *See* Petition for Writ of Certiorari, p. 4. To even reach the immunity issue in

this case, the parties would first have to brief – and the Court consider – the tertiary issue whether the Petitioner long ago waived the very immunity it seeks in this case, and has instead attempted to game the system by fully litigating the matter in its chosen federal forum and then raising the immunity issue for the first time only after a judgment was entered against it.

In short, the substantive issue presented by Petitioner is not worthy of further review, and this case is procedurally inappropriate for review. The Petition for Writ of Certiorari should be denied.

FACTS

Initially hired as an Assistant Professor in the Department of Obstetrics and Gynecology in 1976, Theresa Siler-Khodr obtained tenure in 1979 and became a Full Professor with tenure in 1986. *Siler-Khodr v. University of Texas Health Science Center San Antonio*, 261 F.3d 542, 544 (5th Cir. 2001). Siler-Khodr has a Ph.D. in biochemistry, and primarily conducts laboratory research regarding reproductive endocrinology. *Id.* She publishes the results of her research, supervises Fellows and teaches classes. *Id.* Her supervisor is Dr. Robert Schenken ("Schenken"). *Id.* Siler-Khodr has also directed clinical and research service laboratories. *Id.*

Also in the Department is Dr. Sydney Shain ("Shain"). He joined the University in 1989, thirteen years after Siler-Khodr did. *Id.* Like Siler-Khodr, Shain i) has a Ph.D. in biochemistry; ii) primarily conducts laboratory research regarding reproductive endocrinology; ii) publishes the results of his research; iv) supervises departmental

Fellows; v) teaches classes; and vi) is supervised by Dr. Schenken. *Id.*

The Department's Chairman since 1979 is Carl Pauerstein. *Id.* According to Pauerstein, Siler-Khodr and Shain have essentially the same duties and responsibilities. *Id.* Their supervisor, Schenken, agrees.

Although Siler-Khodr and Shain have virtually identical qualifications and jobs, the University compensates them very differently. The University pays Shain approximately $20,000 per year more than Siler-Khodr for performing essentially the same job. *Id.*

One explanation for this discrepancy might be found in the University's wage structure for faculty, one that the University for years has known reveals a bias against its female professors. *Id.* at 544-45. In 1994, the University's president circulated to all faculty a study demonstrating that, within the institution, female faculty's average salary was significantly lower than male professors. At trial, Siler-Khodr also presented the report and testimony of Dr. Mary Gray ("Gray"), a professor in the Mathematics and Statistics Department at American University. *Id.* at 544-45. For this case, Gray performed a multiple-regression analysis of the University's salary wage structure. *Id.* at 544-47. In her analysis, Gray controlled for numerous variables that might affect salary and still found that sex was a statistically significant factor influencing the salaries at the University.[1] *Id.* at 544-47.

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[1] The University had access to the same data yet offered no comparable or contrasting study at trial. *Id.* at 547. Young testified that

(Continued on following page)

As for the difference between Shain's pay and Siler-Khodr's pay, the University initially contended that it reflected nothing more than a difference in the amount and type of grant funding they generated. Siler-Khodr did not, contrary to the University's claim, receive "regular" raises; rather she received substandard ones. *Id.* at 548. At trial, Siler-Khodr demonstrated that she had brought in more grant money than Shain. *Id.* Even more puzzling was the fact that during a four year period in which Shain had no grant money, but Siler-Khodr did, Shain still received greater raises than Siler-Khodr. *Id.*

The University also claimed that the difference was reflective of Shain's pre-UT salary, but this contention failed too. In fact, the University's assertion that it was "undisputed" that Shain would not have accepted employment there for less than $80,000.00 is rather extraordinary. The University provided no evidence that Shain would have never accepted employment for less than $80,000.00, and Respondent has hotly disputed this issue. *Id.* at 549. There was no negotiated salary.[2] *Siler-Khodr,* 261 F.3d at 549. Shain made clear that he wanted out of his old job because he grew tired of the administrative responsibilities he had in that position; instead, he wanted

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nothing has prevented the University from doing so, whether in response to the University's 1994 study or the one that Gray prepared in connection with this litigation. Tr. 416-17.

[2] The University simply decided that Shain's wages would be a raise from his private sector employment, Tr. 290, without ever having any discussions with him about salary requirements. Tr. 290, 331. Further, the University's largess is particularly striking since Shain wanted to leave his prior employer, and says he wanted an opportunity in academia with opportunity for collaboration with colleagues. Tr. 327-28.

to return to academic research. *Id.* He was not leaving the prior employer because of money concerns, and he did not join UT because of the money.[3] On the basis of Shain's testimony alone, the jury could have rejected the University's contention that Shain was offered a certain amount of money in order to entice him to come to the University.

STATEMENT OF THE CASE

Following a four-day trial, the jury found that the University had discriminated against Dr. Siler-Khodr on the basis of gender in violation of Title VII and the Equal Pay Act. *Siler-Khodr*, 261 F.3d at 545. The jury awarded $91,000 for back wages, plus $20,000 for compensatory damages. *Id.* These sums were reflected in the final judgment, along with liquidated damages under the Equal Pay Act in an amount equal to the unpaid back wages. The trial court later awarded attorney's fees, which is the subject of a separate, abated appeal.

The University appealed to the United States Court of Appeals for the Fifth Circuit. For the first time, the University asserted that it was immune from suit pursuant to the Eleventh Amendment. It also challenged the judgment on factual sufficiency grounds. Because of the

[3] Shain's testimony wavered considerably regarding the issue of whether he came to the University for money. He testified at one point that he did not come to the University of Texas for money, and that it was not a factor in why he came to the University. Tr. 330-31. He later testified that the money offered was one consideration, but "not a major consideration by any means."Tr. 330-31. Finally, he also testified that if he had not been offered the amount he was offered, he "probably would have asked for more." Tr. 330-31; *Siler-Khodr,* 261 F.3d at 549.

constitutional challenge to an act of congress, the United States of America intervened.

The Fifth Circuit affirmed the judgment in all respects. All three judges agreed as to factual sufficiency, but Judge DeMoss dissented from the Court's holding that the Equal Pay Act was constitutional. The University sought rehearing *en banc*. The Fifth Circuit denied that petition. Judge Jerry E. Smith authored a dissent, which Judge DeMoss joined.

The University now seeks certiorari.

SUMMARY OF THE ARGUMENT

This case does not meet the requirements for review under Supreme Court Rule 10(c). The extant case law is consistent with this Court's Eleventh Amendment precedent. Further, this is not the proper vehicle to review the Equal Pay Act's constitutionality because that issue may be reached only after considering the side issue of whether the Petitioner waived its potential immunity by removing this case to federal court and then litigating it fully to an adverse judgment.

Separately, in three unamplified paragraphs, the Petitioner seeks review of the judgment's factual sufficiency. This argument does not meet Rule 10(c)'s standard. The record amply supports the judgment. In a case like this, where the jury simply did not believe the Petitioner's affirmative defenses, it has no basis at all to seek Supreme Court review. Moreover, there was ample evidence of pretext to support the Title VII verdict.

ARGUMENT

A. The University has waived its Eleventh Amendment immunity by Removal to Federal Court.

The Court cannot reach the constitutional question without first deciding whether the University has waived its claim of Eleventh Amendment immunity. Siler-Khodr contends that it has. This procedural wrinkle makes the case inappropriate for review.

In *Lapides v. Board of Regents of the University System of Georgia*, 122 S.Ct. 1640 (2002), this Court held that a state's removal of a state law claim to federal court waived such immunity. While this case involves federal claims, the Court specifically reserved the question of waiver by removal of federal claims. *Id.* at 1643.

In this case, the Petitioner not only removed the case to federal court but it proceeded to litigate there from 1997 until 2000. Then, after fully litigating the case on the merits, and losing, it for the first time challenged subject matter jurisdiction on appeal. The Petitioner's decision was strategic; for if it could have obtained dismissal or summary judgment or a favorable jury verdict on the merits in its preferred federal forum, it would never have invoked a jurisdictional objection. The Petitioner was satisfied with federal court only up until the federal court entered a judgment against it. Then, it claimed it had never been subject to the jurisdiction it had invoked.

Contrary to the University's suggestion, the Fifth Circuit's holding that a party could waive such an argument even prior to the *Lapides* case is not binding on this court and may be distinguishable. Nor has this Court squarely addressed the issue. Not only is it arguable that

it would be difficult to foresee the *Lapides* decision, it would be particularly difficult to foresee the application of *Lapides* to federal claims before the *Lapides* decision was published.

Because the constitutional question cannot be reached without first addressing the procedural question, this case is simply not suitable for review.

B. There is no controversy regarding the States' immunity from the Equal Pay Act; Every court to decide this issue has upheld the Equal Pay Act's application to the States.

1. Certiorari Should Be Denied With Respect to the Equal Pay Act's Constitutionality.

This case does not present an important question of federal law that requires resolution of this Court, and neither is the Fifth Circuit's judgment inconsistent with this Court's precedent. The circuit courts to have considered the issue are unanimous for a reason: the Equal Pay Act's constitutionality simply is not an extraordinary proposition. Nor, for that matter, does the issue currently pending before the Court in *Hibbs v. Nevada Dept. of Human Resources*, 273 F.3d 844 (9th Cir. 2001), *cert. granted*, 122 S.Ct. 2618 (2002), shed any light on the issue in this case. There is no conflict between the Equal Pay Act jurisprudence and those cases involving the Family and Medical Leave Act. The Petition for Writ of Certiorari should be denied.

That the EPA is constitutional is so well-established by the circuit courts that each of them to have considered the issue has declared it constitutional. *Siler-Khodr v. University of Texas Health Science Center at San Antonio*,

261 F.3d 542 (5th Cir. 2001); *Cherry v. University of Wisconsin System Board of Regents*, 265 F.3d 541(7th Cir. 2001); *Varner II*, 226 F.3d at 927; *Kovacevich v. Kent State Univ.*, 224 F.3d 806 (6th Cir. 2000); *Hundertmark v. State of Florida Dept. of Transp.*, 205 F.3d 1272 (11th Cir. 2000); *O'Sullivan v. Minnesota*, 191 F.3d 965 (8th Cir. 1999); *Ussery v. State of Louisiana on Behalf of Louisiana Dep't of Health and Hospitals*, 150 F.3d 431 (5th Cir. 1998), *cert. dismissed*, 526 U.S. 1013 (1999); *Timmer v. Michigan Dep't of Commerce*, 104 F.3d 833 (6th Cir. 1997); *Varner v. Illinois State Univ.*, 150 F.3d 706 (7th Cir. 1998), *cert. granted, vacated and remanded*, 528 U.S. 1110 (2000) (*Varner I*); *Anderson v. State Univ. of New York*, 169 F.3d 117 (2d Cir. 1999), *cert. granted, vacated and remanded*, 528 U.S. 1111 (2000), *constitutionality confirmed on remand*, 107 F. Supp.2d 158 (N.D.N.Y. 2000).

No circuit has found the statute unconstitutional. Aside from the Fifth Circuit's panel opinion in this case, none of these other opinions even generated a dissent. None of these cases were considered so extraordinary in their holdings, or a departure from this Court's jurisprudence, that they were re-heard *en banc*.

The simplest explanation for this unanimity of opinion is that the circuit courts are correct, and they have correctly considered and synthesized this Court's Eleventh Amendment jurisprudence. The *Varner II* opinion exists only because this Court wished the issue reconsidered in light of *Kimel*. Following the second opinion, this Court elected not to review it. *Varner*, 533 U.S. at 902. The Eleventh Circuit in *Hundertmark v. State of Florida Dept. of Transp.*, 205 F.3d 1272, considered *Kimel* before finding the EPA constitutional. *Hundertmark*, 205 F.3d at 1277. So did *Kovacevich*. 224 F.3d at 820. The Fifth Circuit in this

case considered both *Kimel* and *Board of Trustees of the University of Alabama, et al. v. Garrett*, 531 U.S. 356 (2001). *See Siler-Khodr*, 261 F.3d at 549-550.

The courts are unanimous for good reason. Eleventh Amendment immunity is not absolute. It may be abrogated by Congress pursuant to its enforcement power under § 5 of the Fourteenth Amendment. *Kimel*, 528 U.S. at 81.

Abrogation is governed by a three-prong test discerned from *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) and *City of Boerne v. Flores*, 521 U.S. 507 (1997). In *Seminole Tribe*, the Supreme Court held that Congress may constitutionally abrogate a State's Eleventh Amendment immunity if it (a) unequivocally expresses the clear legislative intent to do so, and (b) acts **pursuant to** a valid exercise of constitutional power. *Seminole Tribe*, 517 U.S. at 55. In *City of Boerne*, the Supreme Court reaffirmed a third and rudimentary requirement that the legislation itself be **within** Congressional powers. *See City of Boerne*, 521 U.S. at 535. Put another way, the third query is whether Congressional action was proportional to the injury to be prevented or remedied, in this case, the serious and endemic problem of discrimination against women in the payment of wages. *City of Boerne*, 521 U.S. at 533; *Varner*, 150 F.3d at 716. In passing the EPA, Congress both legally abrogated the States' sovereignty and acted within its Fourteenth Amendment powers. The Circuit Courts that have addressed this issue are unanimous on that point.

2. The *Hibbs* Case is Not Germane to this Case Because the Narrow Scope of the EPA Passes the Congruence and Proportionality Test Even if the FMLA Does Not.

The Equal Pay Act is an extremely narrow statute. By its very terms, it is plainly targeted at gender discrimination. It stands for the narrow proposition of equal pay for equal work. *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974). The statute targets only gender discrimination and, even then, only discrimination that manifests itself via unequal wages for performing equal jobs. The Equal Pay Act targets only discriminatory and, in the context of government employers, unconstitutional conduct.

The FMLA, by contrast, is an extremely broad statute. It created a federal entitlement and provides a broad class of rights to a broad class of individuals. Its remedies are by no means limited to individuals who have been the object of discriminatory or unconstitutional conduct. Unlike the Equal Pay Act, it is not, by its very text, plainly targeted at gender discrimination. In fact, the FMLA provides protection to men and women who have serious health conditions and does so on the same terms. If the Act was targeted at gender inequality, it is not apparent from the Act itself.

In practice, then, this Court's congruence and proportionality test would seem to have wholly distinct applications as between the two statutes. A finding that the FMLA does not pass muster because it prohibits a wide range of ***constitutional*** conduct has no application to the EPA, which addresses only ***unconstitutional*** conduct. The Eleventh Circuit had it exactly right when it found:

> A state that intentionally discriminates on the basis of gender violates the Fourteenth Amendment unless the gender-based classification serves important governmental objectives and the discriminatory means employed "are substantially related to the achievement of those objectives." *Kimel*, 528 U.S. at 85. . . . This showing requires an "exceedingly persuasive justification" for gender discrimination. *United States v. Virginia*, 518 U.S. 515, 533 (1996).

Kovacevich, 224 F.3d at 820. It is likely for that reason, then, that the Fifth, Sixth, Eighth and Eleventh Circuits have found the EPA constitutional but the FMLA unconstitutional in whole or in part.[4] The EPA narrowly targets unconstitutional conduct where the burden is on government to justify itself; the FMLA does not.

The Petitioner urges that there exists an inconsistency between the various circuits' resolution of these two distinct issues, and that this is a reason to grant certiorari. Petitioner's tautology, though, is fundamentally flawed. It is perfectly consistent with this Court's holdings to find that the Equal Pay Act may be constitutionally applied to the states, but that the FMLA may not. The EPA may satisfy the congruence and proportionality test even while other statutes (including other statutes that

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[4] *Compare:* Fifth Circuit: *Siler-Khodr*, 261 F.3d at 550, and *Kazmier v. Widmann*, 225 F.3d 519 (5th Cir. 2000); Sixth Circuit: *Kovacevich*, 224 F.3d at 806, and *Sims v. University of Cincinnati*, 219 F.3d 556 (6th Cir. 2000); Eighth Circuit: *O'Sullivan*, 191 F.3d at 967-68, and *Townsel v. Missouri*, 233 F.3d 1094 (8th Cir. 2000); and Eleventh Circuit: *Hundertmark*, 205 F.3d at 1274-77, and *Garrett v. University of Alabama Board of Trustees*, 193 F.3d 1214, 1219-20 (11th Cir. 1999), *rev'd on other grounds*, 531 U.S. 356 (2001).

purport to target gender bias) do not. Regardless of the FMLA's constitutionality, the fact remains that the Equal Pay Act narrowly targets conduct that is always (or almost always) unconstitutional. That makes the statute constitutional under this Court's test.

C. There is No Factual Sufficiency Issue Worthy of Review.

The University separately contends that this Court should grant certiorari with respect to the judgment's factual sufficiency. The University contends that the jury and trial court were bound, as a matter of law, to believe it when it claimed to have a legitimate, non-discriminatory excuse for paying Siler-Khodr less than Shain. It contends that the jury was obliged to believe that it paid Shain more during the time period covered by Siler-Khodr's suit because, years before, it had hired him at a higher rate. The University claims that this case falls within a narrow exception carved by *Reeves*, where the uncontradicted evidence affirmatively establishes that, notwithstanding the pretextual nature of Defendant's excuse, the adverse action did result from a non-discriminatory basis.

This case, however, does not present a factual sufficiency issue worthy of review. First, none of the judges below thought that the factual sufficiency was remarkable at all. Although the panel opinion drew a dissent as to the constitutional question, all three judges were in agreement as to factual sufficiency. Second, the University's claim about Shain's initial salary was not only hotly contested, it was facially pretextual. As noted above, Shain testified that he did not come to the University of Texas for financial reasons and, indeed, that he sought to leave his prior

job for distinctly non-pecuniary reasons. He wanted to leave private industry, where he was tired of his responsibilities, and return to academia. Those reasons had nothing to do with money, and the fact-finder was certainly free to consider that the market-forces justification was simply an after-the-fact, litigation-borne excuse. Certainly the jury saw no evidence presented that in 1989, at the time of Shain's hiring, anyone at the University ever established that Shain's comparatively large salary was required to secure his employment. Based on the record, one may reasonably infer that he could have been hired at the same wage paid then to Siler-Khodr, who had many years' seniority over him.

Moreover, this case offers a unique benefit in terms of analyzing factual sufficiency. Because Siler-Khodr presented claims under both Title VII and the Equal Pay Act, the jury considered the University's affirmative defense under the EPA. Specifically, the trial court asked the jury to determine whether the University affirmatively proved, as a factual matter, that it had a non-discriminatory basis for paying Siler-Khodr less than Shain. The jury did not believe the University's excuses, and the verdict and judgment reflected that disbelief. Thus, the record in this case affirmatively establishes that the University's excuses were not the true reason for paying Siler-Khodr less than Shain. This case is thus inappropriate in which to consider the issue left open in *Reeves*, which simply cannot arise where the employer bears the burden of disproving discrimination (as it does under the Equal Pay Act), and where it fails to satisfy its burden of proof.

There is no factual sufficiency issue worthy of this Court's review. The University's second point should be rejected.

CONCLUSION

This case does not qualify for review under Rule 10(c). The Circuits to have considered the question have unanimously found the Equal Pay Act constitutional. This Court recently denied review in *Varner II*. There simply is no inconsistency between the Fifth Circuit's holding and this Court's Eleventh Amendment jurisprudence.

Moreover, the constitutional question may not even be reached without also considering whether the University waived its alleged immunity by voluntarily choosing a federal forum. That side issue's presence in this case makes review particularly inappropriate.

Finally, there is no issue worthy of review regarding the judgment's factual sufficiency.

Respectfully submitted,

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(3)
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No. 02-253

In the Supreme Court of the United States

UNIVERSITY OF TEXAS HEALTH SCIENCE CENTER AT SAN ANTONIO, PETITIONER

v.

THERESA M. SILER-KHODR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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39 PP

QUESTION PRESENTED

The United States will address the following question:

Whether Congress acted within its power under Section 5 of the Fourteenth Amendment in abrogating the States' sovereign immunity from suit under the Equal Pay Act of 1963, 29 U.S.C. 206(d).

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In the Supreme Court of the United States

No. 02-253

UNIVERSITY OF TEXAS HEALTH SCIENCE CENTER AT SAN ANTONIO, PETITIONER

v.

THERESA M. SILER-KHODR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 261 F.3d 542.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 2001. A petition for rehearing was denied on May 16, 2002 (Pet. App. 28a-37a). The petition for a writ of certiorari was filed on August 14, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Equal Pay Act of 1963 (Equal Pay Act), 29 U.S.C. 206(d), as an amendment to the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.* (Supp. IV 1938). Originally, the Equal Pay Act did not apply to public entities. See 29 U.S.C. 206(d) (Supp. V 1963). In 1974, however, Congress amended the Fair Labor Standards Act to apply its prohibitions, including

those in the Equal Pay Act, to state and local governments. See Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6, 88 Stat. 58-59.

In its current form, the Equal Pay Act provides that a covered employer shall not

> discriminate * * * between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.

29 U.S.C. 206(d).

2. Respondent is employed by petitioner University of Texas Health Science Center at San Antonio (University) as a tenured professor specializing in reproductive endocrinology. She began her employment with the University in 1976. In 1989, the University hired Dr. Sydney Shain, a male, who is also a reproductive endocrinologist. Dr. Shain has substantially the same qualifications as respondent, and was given substantially the same responsibilities. The University set Dr. Shain's starting salary at $83,000 a year, which was approximately $20,000 more than the University was paying respondent. That disparity continued until the time of suit. See Pet. App. 1a-3a.

3. Respondent brought suit in Texas state court alleging violations of, among other things, the Equal Pay Act, 29 U.S.C. 206(d), and Title VII of the Civil Rights

Act of 1964, 42 U.S.C. 2000e *et seq.* The University removed the case to federal district court. A jury subsequently found in favor of respondent on her Equal Pay Act and Title VII claims and awarded back pay and compensatory damages. The district court awarded liquidated damages under the Equal Pay Act. Pet. App. 2a-4a.

4. The court of appeals affirmed. Pet. App. 1a-15a.

As relevant here, the court of appeals held that Congress acted within its constitutional authority under Section 5 of the Fourteenth Amendment in extending the Equal Pay Act to the States and abrogating their sovereign immunity from suits under that Act.[1]

The court of appeals rejected the University's argument that Congress acted only under the Commerce Clause, not under the Fourteenth Amendment, in abrogating the States' immunity from suit under the Equal Pay Act. (This Court held in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), that Congress may not abrogate States' immunity through an exercise of its powers under Article I.) The court of appeals reasoned that Congress's invocation of its Commerce Clause authority to apply the Equal Pay Act to private employers in 1963, and its silence on the source of its authority to extend the Act to public entities in 1974, did not show that Congress was relying only on its Commerce Clause authority in abrogating the States' immunity. Pet. App. 12a-13a & n.4.

The court of appeals also rejected the University's argument that the Equal Pay Act's abrogation of sovereign immunity is not valid Section 5 legislation. Apply-

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[1] The United States intervened in the court of appeals under 28 U.S.C. 2403(a) to address the constitutionality of the Equal Pay Act's abrogation of sovereign immunity.

ing *Kimel* v. *Florida Board of Regents*, 528 U.S. 62 (2000), and *Board of Trustees* v. *Garrett*, 531 U.S. 356 (2001), the court of appeals determined that the Equal Pay Act provides a remedy that is "congruent and proportional" to the injury of intentional sex-based discrimination in state employment. Pet. App. 13a. The court of appeals distinguished *Kimel* and *Garrett* as involving discrimination that is not subject to heightened scrutiny under the Equal Protection Clause. *Ibid.* The court of appeals also held that Congress was not required to make specific findings to justify the extension of the Equal Pay Act to the States, observing that "the historical record clearly documents state discrimination on the basis of gender." *Id.* at 14a n.6.

Judge DeMoss dissented from the court of appeals' decision with respect to the Equal Pay Act. He asserted that the Equal Pay Act should be viewed as an exercise of Congress's authority only under the Commerce Clause, and not under Section 5 of the Fourteenth Amendment. Pet. App. 15a-33a. Alternatively, he asserted that the Equal Pay Act exceeds Congress's authority under Section 5 to the extent that, by virtue of its burden-shifting mechanism, it may reach conduct that is not proven to be "intentional sex discrimination" in violation of the Equal Protection Clause. *Id.* at 34a-36a.

ARGUMENT

Petitioner contends (Pet. 7-21) that Congress did not validly abrogate the States' immunity from suit under the Equal Pay Act, 29 U.S.C. 206(d). As petitioner acknowledges (Pet. 8), however, "there is no circuit split" on that question, which has now been addressed by seven courts of appeals. This Court recently denied a petition for certiorari raising the same question.

Illinois State Univ. v. *Varner*, 533 U.S. 902 (2001). There is no reason for a different result here. The unanimous consensus of the courts of appeals is correct and consistent with the holdings of this Court.

In *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), the Court held that Congress may not abrogate the States' sovereign immunity pursuant to its Article I powers, including its power under the Commerce Clause. See *id.* at 55; accord *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 73 (2000). Congress may, however, abrogate the States' immunity pursuant to a proper exercise of its authority to enforce the Fourteenth Amendment. See, *e.g.*, *Board of Trustees* v. *Garrett*, 531 U.S. 356, 364 (2001); *Kimel*, 528 U.S. at 80. That power is not unlimited. As the Court has explained, "§ 5 legislation reaching beyond the scope of § 1's actual guarantees must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Garrett*, 531 U.S. at 364 (quoting *City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997)). The Equal Pay Act, as applied to the States, is appropriate Section 5 legislation under that standard.

1. Petitioner observes (Pet. 10-14) that Congress did not explicitly invoke its authority under Section 5 of the Fourteenth Amendment (or any other provision of the Constitution) when it enacted the 1974 amendment extending the Equal Pay Act to the States and other public employers. Petitioner argues that the amendment consequently can be viewed only as an exercise of Congress's authority under the Commerce Clause, the constitutional provision on which Congress explicitly relied in enacting the original Equal Pay Act in 1963 that applied only to private employers. Petitioner's attempt to confine the inquiry to the particular source

of authority identified by Congress is inconsistent with the decisions of this Court and other courts of appeals.

This Court has recognized that the "constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Woods* v. *Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948); see *EEOC* v. *Wyoming*, 460 U.S. 226, 243 n.18 (1983); *United States* v. *Harris*, 106 U.S. 629, 636 (1883) (when constitutional challenges are brought "question[ing] the power of Congress to pass [a] law," it is "necessary to *search* the Constitution to ascertain whether or not the power is conferred") (emphasis added). Thus, in *EEOC* v. *Wyoming*, the Court rejected the assertion that "congressional action could not be upheld on the basis of § 5 [of the Fourteenth Amendment] unless Congress expressly articulated its intent to legislate under § 5." 460 U.S. at 243 n.18 (citation omitted). The Court went on to observe:

> It is in the nature of our review of congressional legislation defended on the basis of Congress' powers under § 5 of the Fourteenth Amendment that we be able to discern some legislative purpose or factual predicate that supports the exercise of that power. That does not mean, however, that Congress need anywhere recite the words "section 5" or "Fourteenth Amendment" or "equal protection."

Ibid.

The Court's recent sovereign immunity opinions are consistent with that understanding. In those opinions, the Court has described the relevant inquiry as whether "the statute *is* appropriate § 5 legislation," or whether the statute can "be viewed as" appropriate Section 5 legislation. *Garrett*, 531 U.S. at 364 (emphasis added); *Florida Prepaid Postsecondary Educ. Expense*

Bd. v. *College Sav. Bank*, 527 U.S. 627, 639 (1999).[2] The Court's inquiry has not turned on whether Congress specifically invoked Section 5 as the source of its authority to enact the statute at issue.

Thus, in *Kimel*, the Court considered whether the abrogation provision of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, was permissible Section 5 legislation. The ADEA, like the Equal Pay Act, was initially enacted as an amendment to the Fair Labor Standards Act, applied solely to private employers, and was explicitly premised on the Commerce Clause. See *Kimel*, 528 U.S. at 68. Congress subsequently extended the nondiscrimination requirements of both statutes to state employers, without specifically identifying the source of its authority to do so. See *ibid.* Yet, the Court in *Kimel*

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[2] Contrary to petitioner's suggestion (Pet. 13), nothing in *Florida Prepaid* supports the proposition that, because Congress did not explicitly identify Section 5 as the source of its authority to abrogate the States' immunity from suit under the Equal Pay Act, the abrogation cannot be sustained as permissible Section 5 legislation. In the Patent Remedy Act, the statute at issue in *Florida Prepaid*, Congress explicitly invoked its authority under Section 5. See 527 U.S. at 635-636. The case consequently presented no question whether, if Congress had failed to do so, any Section 5 inquiry would have been foreclosed. Petitioner relies on a portion of *Florida Prepaid* in which the Court, as part of its Section 5 "congruence and proportionality" analysis of the Patent Remedy Act, sought to "identify the Fourteenth Amendment 'evil' or 'wrong' that Congress intended to remedy." *Id.* at 639. The Court rejected the suggestion that Congress had intended to remedy violations of the Just Compensation Clause of the Fifth Amendment, because the statutory text and history indicated that Congress had instead intended to remedy violations of the Due Process Clause of the Fourteenth Amendment. *Id.* at 642 n.7. None of that discussion related to whether Congress was required to identify the constitutional source of its authority to enact the statute.

did not quibble over whether Congress believed that its authority derived from the Commerce Clause or from the Fourteenth Amendment. Instead, the Court held that the abrogation would be effective "if, and only if, the ADEA *is* appropriate legislation under § 5." *Id.* at 80 (emphasis added). The Court's ultimate holding that the ADEA was not appropriate Section 5 legislation rested not on the Congress's failure to identify Section 5 as the source of its authority, but on the ADEA's lack of "congruence and proportionality" to constitutional violations. *Id.* at 82-91.[3]

The courts of appeals have likewise recognized, including in cases challenging Congress's power to enact a statute implicating state sovereign immunity, that "[w]hat matters, or at least should matter, is the extent of national power, rather than the extent of legislative prevision." *Board of Educ. of Oak Park* v. *Kelly E.*, 207 F.3d 931, 935 (7th Cir.) (Easterbrook, J.), cert. denied, 531 U.S. 824 (2000). "Otherwise," as one court observed, "we require the legislature to play games ('guess what clause the judiciary will think most appropriate')." *Ibid.*; see, *e.g.*, *Abril* v. *Virginia*, 145 F.3d 182, 186 (4th Cir. 1998) ("[U]nder general principles of constitutional adjudication, [an] abrogation does not require that a specific provision be invoked as the source of congressional power."); *Wheeling & Lake Erie Ry.* v. *Public Util. Comm'n*, 141 F.3d 88, 92 (3d Cir. 1998) ("[W]hen determining the sources of Congress's authority to legislate, we may look beyond the expressed consti-

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[3] So, too, Congress initially enacted Title VII pursuant to its Commerce Clause authority and later extended it to public employers. See *United Steelworkers of Am.* v. *Weber*, 443 U.S. 193, 206 n.6 (1979). That did not prevent this Court from holding that the extension of Title VII to the States was valid under Section 5. See *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 452-456 (1976).

tutional basis in a statute's preamble or legislative history."), cert. denied, 528 U.S. 928 (1999).[4]

It is thus well settled that, contrary to petitioner's suggestion, the constitutionality of the Equal Pay Act's abrogation of state sovereign immunity turns on "whether Congress had the authority to adopt the legislation, not whether it correctly guessed the source of that power." *Abril*, 145 F.3d at 186 (quoting *Usery* v. *Charleston County Sch. Dist.*, 558 F.2d 1169, 1171 (4th Cir. 1977)).

2. Petitioner further contends (Pet. 14-21) that the Equal Pay Act is not, in any event, an "appropriate" exercise of Congress's power under Section 5 of the Fourteenth Amendment. The court of appeals held, however, that the Equal Pay Act is sustainable under Section 5 as a "congruent and proportional" means of preventing and remedying intentional sex discrimination in employment. Pet. App. 13a. That holding is correct and is consistent with the holdings of every other court of appeals that has addressed the question, both before and after *Kimel* and *Garrett*.[5]

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[4] See also, *e.g.*, *Union Pac. R.R.* v. *Utah*, 198 F.3d 1201, 1203 (10th Cir. 1999); *United States* v. *Moghadam*, 175 F.3d 1269, 1275 (11th Cir. 1999), cert. denied, 529 U.S. 1036 (2000); *Franks* v. *Kentucky Sch. for the Deaf*, 142 F.3d 360, 363 (6th Cir. 1998); *Oregon Short Line R.R.* v. *Department of Revenue*, 139 F.3d 1259, 1265-1266 (9th Cir. 1998); *Mills* v. *Maine*, 118 F.3d 37, 43-44 (1st Cir. 1997); *Crawford* v. *Davis*, 109 F.3d 1281, 1283 (8th Cir. 1997); *Counsel* v. *Dow*, 849 F.2d 731, 735-737 (2d Cir.), cert. denied, 488 U.S. 955 (1988).

[5] See *Varner* v. *Illinois State Univ.*, 226 F.3d 927, 928-936 (7th Cir. 2000), cert. denied, 533 U.S. 902 (2001); *Kovacevich* v. *Kent State Univ.*, 224 F.3d 806, 819-821 (6th Cir. 2000); *Hundertmark* v. *Florida Dep't of Transp.*, 205 F.3d 1272, 1274 (11th Cir. 2000); *O'Sullivan* v. *Minnesota*, 191 F.3d 965, 968 (8th Cir. 1999); *Anderson* v. *State Univ. of N.Y.*, 169 F.3d 117 (2d Cir. 1999),

The extension of the Equal Pay Act to the States, with its attendant abrogation of sovereign immunity, is a permissible exercise of Congress's power under Section 5 of the Fourteenth Amendment to enact "appropriate legislation" to "enforce" the substantive guarantees of the Equal Protection Clause. This Court has recognized that Congress, in exercising that power, "is not limited to mere legislative repetition of this Court's constitutional jurisprudence." *Garrett*, 531 U.S. at 365. "Rather, Congress' power 'to enforce' the [Fourteenth] Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Ibid.* (quoting *Kimel*, 528 U.S. at 81).

The Court has explained that Section 5 legislation that "reach[es] beyond the scope" of constitutional guarantees "must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Garrett*, 531 U.S. at 365 (quoting *Boerne*, 521 U.S. at 520). In order to determine whether a statute satisfies that standard, the Court has prescribed a three-step analysis: first, the court must "identify with some precision the scope of the constitutional right at issue," *ibid.*; second, the court must "examine whether Congress identified a history and pattern of unconstitutional * * * discrimination by the States" against the group protected by the

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vacated, 528 U.S. 1111 (2000), on remand, 107 F. Supp. 2d 158 (N.D.N.Y. 2000) (reaffirming validity of abrogation); *Ussery* v. *Louisiana*, 150 F.3d 431 (5th Cir. 1998), cert. dismissed, 526 U.S. 1013 (1999); *Timmer* v. *Michigan Dep't of Commerce*, 104 F.3d 833 (6th Cir. 1997); see also *Usery* v. *Charleston County Sch. Dist.*, 558 F.2d at 1171; *Usery* v. *Allegheny County Inst. Dist.*, 544 F.2d 148, 155 (3d Cir. 1976), cert. denied, 430 U.S. 946 (1977).

statute, *id.* at 368; and, finally, the court must assess whether the "rights and remedies created" by the statute are "designed to guarantee meaningful enforcement" of the constitutional rights that Congress determined the States were violating, *id.* at 372, 373. The court of appeals properly applied "these now familiar principles," *id.* at 365, in determining that Congress permissibly abrogated the State's immunity from suit under the Equal Pay Act.

1. *The scope of the constitutional right*: It is "axiomatic" that "[i]ntentional discrimination on the basis of gender by state actors violates the Equal Protection Clause." *J.E.B.* v. *Alabama*, 511 U.S. 127, 130-131 (1994). "Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." *United States* v. *Virginia*, 518 U.S. 515, 531 (1996) (quoting *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 724 (1982)). In contrast to state action based on age (as in *Kimel*) or disability (as in *Garrett*), state action based on sex bears a "burden of justification" that is "demanding" and "rests entirely on the State." *Id.* at 533. The State must demonstrate "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Ibid.* The justification for gender-based state action "must be genuine, not hypothesized or invented *post hoc* in response to litigation," and "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Ibid.* The constitutional right to be free from intentional sex discrimination by the government applies to state employment. See *Personnel Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 273 (1979).

2. *The history of unconstitutional state discrimination against women*: This Court has found that women have historically been the subject of a pattern of invidious discrimination by States. See, *e.g.*, *Virginia*, 518 U.S. at 531-532, 543-544; *J.E.B.*, 511 U.S. at 135-136; *Mississippi Univ. for Women*, 458 U.S. at 725 n.10. It should thus be unnecessary to engage in any extended inquiry into whether Congress could also have found that such a pattern existed. In any event, however, Congress extended the Equal Pay Act to the States in the face of ample evidence of a pattern of state constitutional violations.

a. A year before Congress extended the Equal Pay Act to the States, a plurality of the Court declared, without contradiction, that "[t]here can be no doubt that our Nation has had a long and unfortunate history of sex discrimination." *Frontiero* v. *Richardson*, 411 U.S. 677, 684 (1973) (plurality opinion). The plurality explained that, as a result of "paternalistic attitude[s]" toward women, state "statute books gradually became laden with gross, stereotyped distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes." *Id.* at 685. For example, "[n]either slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children." *Ibid.* The plurality further observed that, even in 1973, "women still face[d] pervasive, although at times more subtle, discrimination in our educational institutions [and] in the job market." *Id.* at 686; see *J.E.B.*, 511 U.S. at 136 (noting that women, like racial minorities, have "suffered * * *

at the hands of discriminatory state actors during the decades of our Nation's history").

This Court has since recognized that this historical pattern of state-sanctioned discrimination against women "warrants the heightened scrutiny we afford all gender-based classifications today." *J.E.B.*, 511 U.S. at 136; see *Virginia*, 518 U.S. at 531 (observing that the judiciary's "skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history"). The Court has also recognized that the pattern of discrimination extends to the sphere of employment. See *Virginia*, 518 U.S. at 531-532, 544 (noting, *inter alia*, governmental sex discrimination in employment); *Mississippi Univ. for Women*, 458 U.S. at 725 n.10 ("History provides numerous examples of legislative attempts to exclude women from particular areas [of employment] simply because legislators believed women were less able than men to perform a particular function."); *Frontiero*, 411 U.S. at 689 n.22 (plurality opinion) (women "have historically suffered discrimination in employment").

In view of the Court's own determination that the States engaged in a pattern of intentional sex discrimination, there should be no need to assess whether the record before Congress also demonstrated such a pattern. Cf. *Kimel*, 528 U.S. at 91 (noting that an examination of the legislative record is not necessary in all circumstances). This case stands in sharp contrast to *Kimel* and *Garrett* with respect to the need to consult the record before Congress. *Kimel* concerned Congress's efforts to prohibit discrimination on the basis of age, a classification that is not subject to heightened scrutiny, in part because the Court has found no "history of purposeful unequal treatment" of older workers by the government. *Massachusetts Bd. of Ret.* v.

Murgia, 427 U.S. 307, 313 (1976). Similarly, in *Garrett*, the Court addressed a statute prohibiting employment discrimination against individuals with disabilities. See 531 U.S. at 365-366. Such discrimination is subject to rational basis scrutiny, in part, because "lawmakers have been addressing the[] difficulties [of individuals with disabilities] in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary." *City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 443 (1985). In both cases, the Court looked to the legislative record to determine whether, notwithstanding the absence of case law premised on the existence of a pattern of unconstitutional discrimination, Congress itself had established the existence of such discrimination against individuals with disabilities or older workers. See *Garrett*, 531 U.S. at 368-372; *Kimel*, 528 U.S. at 88-91. Here, however, the cases discussed above represent a judicial confirmation of a pattern of unconstitutional discrimination against women that justifies both this Court's decision to apply heightened Equal Protection scrutiny to sex discrimination and Congress's decision to abrogate States' immunity from suit under the Equal Pay Act.

b. In any event, when Congress extended the Equal Pay Act to public employers in 1974, it was aware of the extensive findings and legislative records compiled through a series of recent legislative efforts at eradicating sex discrimination by States. Extending the Equal Pay Act to the States was the last of four steps taken by Congress in the early 1970s to address sex discrimination by state and local governments.[6] Specifically,

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[6] As Justice Powell noted, "[a]fter Congress has legislated repeatedly in an area of national concern, its Members gain experi-

Congress enacted the Education Amendments of 1972, which extended a non-discrimination prohibition to all education programs receiving federal funds, including those of state universities, and extended the Equal Pay Act to all employees of educational institutions, see Education Amendments of 1972, Pub. L. No. 92-318, Title IX, §§ 901-907, 86 Stat. 373-375; Congress extended Title VII's prohibition against discrimination in employment to state and local employers, see Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103; Congress submitted the Equal Rights Amendment to the States for ratification, see H.R. J. Res. No. 208, 92d Cong., 2d Sess. (1972); and Congress extended the protections of the Equal Pay Act to state employees, see Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55. Between 1969 and 1973, Congress held extensive hearings[7] and received numerous reports from the Execu-

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ence that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area." *Fullilove* v. *Klutznick*, 448 U.S. 448, 502-503 (1980) (opinion of Powell, J.).

[7] See, *e.g.*, *Economic Problems of Women: Hearings Before the Joint Econ. Comm.*, 93d Cong., 1st Sess. (1973) (*Economic Problems*); *Oversight Hearings on Discrimination Against Women: Before the Ad Hoc Subcomm. on Discrimination Against Women of the House Comm. on Educ. and Labor*, 92d Cong., 2d Sess. (1972) (*Discrimination Against Women (1972)*); *Oversight Hearings on Unemployment and Discrimination in Employment Before the General Subcomm. on Labor of the House Comm. on Educ. and Labor*, 92d Cong., 2d Sess. (1972) (*Unemployment and Discrimination*); *Equal Rights for Men and Women 1971: Hearings Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 92d Cong., 1st Sess. (1971) (*Equal Rights (1971)*); *Higher Education Amendments of 1971: Hearings Before the Special Subcomm. on Higher Educ. of the House Comm. on Educ. and Labor*, 92d Cong., 1st Sess. (Pt. 2) (1971) (*Higher Education 2*); *Higher Education Amendments of 1971: Hearings Before the Special*

tive Branch[8] on the subject of sex discrimination, including sex discrimination by the States. Congress heard extensive testimony that sex discrimination by state employers was common,[9] that state employers

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Subcomm. on Higher Educ. of the House Comm. on Educ. and Labor, 92d Cong., 2d Sess. (Pt. 1) (1971) (*Higher Education 1*); *Equal Employment Opportunities Enforcement Act of 1971: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Pub. Welfare*, 92d Cong., 1st Sess. (1971) (*Equal Employment (Senate 1971)*); *Equal Employment Opportunity Enforcement Procedures: Hearings Before the Gen. Subcomm. on Labor of the House Comm. on Educ. and Labor*, 92d Cong., 1st Sess. (1971) (*Equal Employment (House 1971)*); *Discrimination Against Women: Hearings Before the Special Subcomm. on Educ. of the House Comm. on Educ. and Labor*, 91st Cong., 2d Sess. (1970) (*Discrimination Against Women (1970)*); *The "Equal Rights" Amendment: Hearings on S.J. Res. 61 Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970) (*Equal Rights (1970)*); *Equal Employment Opportunity Enforcement Procedures: Hearings Before the Gen. Subcomm. on Labor of the House Comm. on Educ. and Labor*, 91st Cong., 1st & 2d Sess. (1969-1970); *Equal Employment Opportunities Enforcement Act: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Pub. Welfare*, 91st Cong., 1st Sess. (1969) (*Equal Employment (1969)*).

[8] See, *e.g.*, President's Task Force on Women's Rights and Responsibilities, *A Matter of Simple Justice* (Apr. 1970) (*Simple Justice*); Women's Bureau, U.S. Dep't of Labor, *Fact Sheet on the Earnings Gap* (Feb. 1970) (reprinted in *Discrimination Against Women (1972)* 17-19); see also President's Comm'n on Status of Women, *American Women* (1965); President's Comm'n on Status of Women, *Report of the Committee on Federal Employment* (1963); President's Comm'n on Status of Women, *Report of the Committee on Civil and Political Rights* (1963).

[9] See, *e.g.*, *Economic Problems* 131 (Aileen C. Hernandez, former member, EEOC) (state and local government employers "are notoriously discriminatory against both women and minorities"); *id.* at 556 (Frankie M. Freeman, U.S. Comm'n on Civil Rights) ("State and local government employment has long been recog-

nized as an area in which discriminatory employment practices deny jobs to women and minority workers."); *Equal Rights (1971)* 479 (Mary Dublin Keyserling, National Consumers League) ("It is in these fields of employment [*i.e.*, state and local government and educational institutions] that some of the most discriminatory practices seriously limit women's opportunities."); *id.* at 548 (Citizen's Advisory Council on Status of Women) ("numerous distinctions based on sex still exist in the law" including "[d]iscrimination in employment by State and local governments"); *Higher Education 2* at 1131 (study by American Association of University Women) ("women do not have equal status with men in academe," "particularly * * * in the large public institutions"); *American Women* 19-20 (noting "prejudicial attitudes and practices" by, *inter alia*, "governmental organizations" in "hiring, wages, and promotion").

The President's Commission on the Status of Women surveyed States regarding their employment policies toward women. Eleven States gave the appointing officer "the unrestricted right to specify male or female" candidates for original appointments, and 15 States "permit[ted] the appointing officer to limit his consideration to one sex in promotion." *Report of the Committee on Federal Employment* 68. Even among those States that limited the appointing officer's discretion not to consider women, many excluded women from broad categories of jobs. For example, Michigan "require[d] that men only shall apply for classes such as State police trooper, steeplejack, bulldozer operator, prison guard, liquor enforcement operator, [and] patrol boat captain"; Colorado considered only men for "jobs on night shifts, working bars, * * * or where heavy lifting is required"; Illinois considered only men for positions such as prison guard and district office police clerk; and Indiana and Texas considered only men for positions requiring physical strength. *Id.* at 71-73. Even when women were not formally excluded from positions, States reported that their agencies did not consider women for positions for which they were qualified. See *id.* at 72 (Oregon reported that "the employing agencies sometimes ignore the women certified"; Montana reported that "we have certain positions that could be filled by women for which men are usually selected").

discriminated against women with respect to wages,[10] and that existing remedies, at both the state and the federal levels, were inadequate.[11] Much of that

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[10] See, *e.g.*, *Equal Employment (House 1971)* 486, 489 (Modern Language Association) (in survey of language departments, half at public colleges and universities, "salary differences between men and women full-time faculty members are substantial," even "at equivalent ranks in the same departments"); *id.* at 510 (Dr. Ann Scott, National Organization for Women) (noting that women in state employment "suffer some of the worst discrimination," which could be addressed by extension of the Equal Pay Act); *Discrimination Against Women (1970)* 301 (Dr. Bernice Sandler, Women's Equity Action League) (noting that "[s]alary discrepancies abound" in the academic ranks of public and private universities; "[n]umerous national studies have documented the pay differences between men and women with the same academic position and qualifications"); *id.* at 644-645 (Peter Muirhead, Deputy Assistant Secretary, Department of Health, Education and Welfare) (observing, with respect to public and private universities, that "[a]t all faculty ranks, women are paid less than their male colleagues," and that such "inequities are so pervasive that direct discrimination must be considered as p[l]aying a share"); *id.* at 1034-1036 (Dr. Alan Bayer and Dr. Helen Astin) (empirical study of recent doctoral recipients reports that "[a]cross all work settings [including public universities], fields, and ranks, women experience a significantly lower average academic income than do men in the academic teaching labor force for the same amount of time").

[11] Before the extension of the Equal Pay Act and Title VII to the States, some state employers were subject to federal non- discrimination requirements as a condition of receiving federal contracts or certain federal funds. Congress was advised, however, that neither those requirements nor suits under the Equal Protection Clause were sufficient to eradicate discrimination against women in state employment. See, *e.g.*, *Discrimination Against Women (1970)* 26 (Jean Ross, American Association of University Women) ("[A]s in the case of [racial minorities], the additional protective acts of recent years, such as the Equal Pay for Equal Work Act and the Civil Rights Act[,] are required and need strengthening to insure the equal protection under the law which

evidence revealed widespread and entrenched employment discrimination against women employed at state colleges and universities.[12] Congress heard detailed testimony that women at state institutions throughout

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we are promised under the Constitution."); *id.* at 304 (Dr. Bernice Sandler) (noting the need for additional legislation "to begin to correct many of the inequities that women face," including "salary inequities" at colleges and universities); *Equal Employment (1969)* 51-52 (William H. Brown III, Chair, EEOC) (observing that "most" state and local governments "do not have effective equal job opportunity programs, and the limited Federal requirements in the area (e.g., 'Merit Systems' in Federally aided programs) have not produced significant results"). Nor were effective state remedies perceived to be available. See, *e.g.*, *Discrimination Against Women (1970)* 133 (Wilma Scott Heide, Pennsylvania Human Relations Comm'n) (urging that Title VII be extended to educational institutions because "[o]nly a couple States have or currently contemplate any prohibition of sex discrimination in educational institutions"); *Equal Rights (1970)* 744 (while 31 States had laws requiring equal pay for equal work, only nine of those laws applied to public employment); *Equal Employment (1969)* 170 (Howard Glickstein, U.S. Comm'n on Civil Rights) (noting that state and local fair employment commissions had not dealt effectively with discrimination in public employment).

[12] See, *e.g.*, *Simple Justice* 6-7 (urging extension of Title VII to state employers and finding that "[t]here is gross discrimination against women in education"); *Equal Rights (1971)* 269 (Dr. Bernice Sandler) (noting the "massive, pervasive, consistent, and vicious pattern of discrimination against women in our universities and colleges" and citing examples of such discrimination at state institutions); *Discrimination Against Women (1970)* 299-302 (Dr. Bernice Sandler) (noting instances of employment discrimination by state-supported universities); *id.* at 379 (Dr. Pauli Murray) (urging that Title VII be extended to "public and private institutions of learning" given the "pattern or practice of discrimination in many educational institutions"); *id.* at 452 (Virginia Allan, President's Task Force on Women's Rights and Responsibilities) (noting "the growing body of evidence of discrimination against women faculty in higher education").

the country were paid less than men for substantially the same work.[13] For example, officials of the Department of Health, Education, and Welfare reported to Congress on their investigation into such discrimination at one large state university, which the officials described as "not unlike other universities" in that regard.[14]

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[13] See, *e.g.*, *Discrimination Against Women (1970)* 151, 159 (Dr. Ann Scott) (describing study at the State University of New York-Buffalo that found that "women in the same job categories, administrative job categories, with the same degrees as men received considerably less money as a group"); *id.* at 1225 (study by Dr. Jane Loeb, Chairman, Urbana AAUP Committee on Status of Women) ("The[] data strongly suggest that men and women within the same departments [at the University of Illinois at Urbana-Champaign], holding the same rank, tend not to be paid the same salaries: women on the average earn less than men"); *id.* at 1228 (Salary Study at Kansas State Teachers College) ("Women full-time faculty members experience wide discrimination throughout the college in matters of salaries for their respective academic ranks."); *Equal Rights (1971)* 268 (Dr. Bernice Sandler) ("At the University of Arizona, women who were assistant and associate professors earned 15 percent less than their male counterparts. Women instructors and full professors earned 20 percent less."); *ibid.* (in a "comprehensive study at the University of Minnesota, women earned less in college after college, department after department—in some instances the differences exceeding 50 percent").

[14] See, *e.g.*, *Higher Education 1* at 298 (letter of Don F. Scott, Office for Civil Rights, Dep't of Health, Education, and Welfare) (noting Department's findings that at the University of Michigan "women are in many cases getting less pay than men with the same job titles, responsibilities, and experience" and that "men [are receiving] higher starting salaries than women in the same job classifications"); *id.* at 275 (Owen Kiely, Chief, Contract Compliance Div., Office of Civil Rights, Dep't of Health, Education, and Welfare) ("We found that there were differences in rates of pay [at the University of Michigan] for the same positions in the academic

The congressional committee reports on the various enactments of the period noted the "scope and depth of the discrimination" against women, much of which was found to be "directly attributable to governmental action both in maintaining archaic discriminatory laws and in perpetuating discriminatory practices in employment, education and other areas." H.R. Rep. No. 554, 92d Cong., 1st Sess. 51 (1971) (Higher Education Act of 1971); S. Rep. No. 689, 92d Cong., 2d Sess. 7 (1972) (Equal Rights Amendment). A number of Members of Congress expressed the view that the "well documented" record developed at the hearings revealed "widespread," "persistent," "endemic," "systemic[]," and "rampant" sex discrimination,[15] including sex dis-

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area so that females generally got less for the same position than males did. We found similar patterns in the nonacademic area."); *id.* at 277-278 (Stanley Pottinger, Director, Office of Civil Rights, Dep't of Health, Education, and Welfare) (noting that, "although we have concentrated our actions here on the [U]niversity [of Michigan], it is not unlike other universities").

[15] See 118 Cong. Rec. 3936, 5804 (1972) (Sen. Bayh) (observing that "[d]iscrimination against females on faculties and in administration is well documented" and referencing both public and private institutions); *id.* at 4817-4818 (Sen. Stevenson) (observing that "[s]ex discrimination, especially in employment, * * * is widespread and persistent," and relying, *inter alia*, on disparities in male and female salaries at institutions of higher education); *Equal Rights (1971)* 95 (Rep. Ryan) ("Discrimination levied against women does exist; in fact, it is endemic in our society."); *Discrimination Against Women (1970)* 3 (Rep. Green) ("too often discrimination against women has been either systematically or subconsciously carried out" by "Congress and State legislatures"); *id.* at 235 (Rep. May) ("[S]ex discrimination in the colleges and universities of this Nation * * * is running rampant."); *id.* at 738 (Rep. Griffiths) ("The extent of discrimination against women in the educational institutions of our country constitutes virtually a national calamity."); *id.* at 750 (Rep. Heckler) ("Discrimination by

crimination by state government employers that "persist[ed]" despite the fact that it was "violative of the Constitution of the United States."[16] And, more specifically, they concluded that many employers, including state government employers, were not paying women equal wages for equal work[17] and that the

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universities and secondary schools against women teachers is widespread.").

[16] 118 Cong. Rec. at 1412 (Sen. Byrd).

[17] Members of Congress relied, *inter alia*, on the Department of Labor's *Fact Sheet on the Earnings Gap* (see note 8, *supra*), which found large differences in median wages between men and women full-time workers in general occupational groupings. For example, the *Fact Sheet* reported that, "in institutions of higher education in 1965-66, women full professors had a median salary of only $11,649 as compared with $12,768 for men," and that "[c]omparable differences" were found among associate professors, assistant professors, and instructors. *Discrimination Against Women (1970)* 18. Members of Congress determined that "these differences [in median pay of men and women faculty members] do not occur by accident," but instead "are the direct result of conscious discriminatory policies." *Id.* at 434 (Rep. Mink); see 118 Cong. Rec. at 5805 (Sen. Bayh) (noting that women faculty members "often do not receive equal pay for equal work"); *id.* at 4817-4818 (Sen. Stevenson) (citing salary disparities between male and female faculty members as evidence of discrimination).

Members of Congress also relied on other evidence of wage disparities to conclude that public and private employers were discriminating against women. See, *e.g.*, 117 Cong. Rec. 39,250 (1971) (Rep. Green) (noting the "ample documentation" contained in a "two volume hearing record" of discrimination against women in institutions of higher learning); 118 Cong. Rec. at 5804-5805 (Sen. Bayh) (noting that "[o]ver 1,200 pages of testimony document the massive, persistent patterns of discrimination against women in the academic world," such as testimony that "the University of Pittsburgh calculated that [it] was saving $2,500,000 by paying women less than they would have paid men with the same qualifications"); *id.* at 1840 (Sen. Javits) (noting that state and local governments' "differentiation * * * in respect of income" among

existing laws did not adequately address that problem.[18] Thus, "Congress had developed a clear understanding of the problem of gender discrimination on the part of States through its passage of legislation such as the Education Amendments * * * and its extension of Title VII to state and local employers."

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male and female employees indicates that "something is not right in terms of the way in which the alleged concept of equal opportunity is being administered"); *id.* at 1992 (Sen. Williams) ("Perhaps the most extensive discrimination in educational institutions, however, is found in the treatment of women. * * * [T]his discrimination does not only exist as regards to the acquiring of jobs, but * * * is similarly prevalent in the area of salaries and promotions where studies have shown a well-established pattern of unlawful wage differentials and discriminatory promotion policies."); *Discrimination Against Women (1970)* 740 (Rep. Griffiths) ("Numerous studies document the pay differences between men and women with the same academic rank and qualifications.").

[18] See, *e.g.*, 118 Cong. Rec. at 4931-4932 (Sen. Cranston) (employees of educational institutions "are, at present, without an effective Federal remedy in the area of employment discrimination"); *id.* at 5804 (Sen. Bayh) (noting the need for "a strong and comprehensive measure" to "provide women with solid legal protection from * * * persistent, pernicious discrimination" in higher education); *id.* at 274 (Sen. McGovern) (describing as "weak" and "ineffective" the measures then available to the federal government to combat "discrimination against women in our academic institutions"); *Equal Rights (1971)* 85, 87 (Rep. Mikva) (arguing that the extension of Title VII and the Equal Pay Act were "needed interim to and supplemental to" the ratification of the Equal Rights Amendment and its "implementation under the 14th amendment"); *Discrimination Against Women (1970)* 235 (Rep. May) (unless the civil rights laws are extended to educational institutions, "there is no effective legal way to get at them"); *id.* at 750 (Rep. Heckler) (observing that the Fourteenth Amendment "has not been effective in preventing sex discrimination against teachers in public schools").

Varner v. *Illinois State Univ.*, 226 F.3d 927, 935 (7th Cir. 2000), cert. denied, 533 U.S. 902 (2001).

c. In addition to the evidence developed before the enactment of the Equal Pay Act, the hearings on the legislation that ultimately extended the Equal Pay Act to the States revealed extensive evidence of sex discrimination by States as employers.[19] Congress heard testimony that, because public employees were exempted from the Equal Pay Act, wages for women in state and local government jobs "are most often lower than [those of] their male counterparts."[20] Congress also heard testimony that existing anti-discrimination remedies were insufficient.[21] In addition, Congress heard testimony not only that women received unequal pay for equal work at universities and colleges generally,[22] but also that a number of state universities,

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[19] See *To Amend the Fair Labor Standards Act: Hearings Before the Gen. Subcomm. on Labor of the House Comm. on Educ. and Labor*, 91st Cong., 2d Sess. (Pt. 1) (1970) (*FLSA Hearings (1970)*); *Fair Labor Standards Amendments of 1971: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Pub. Welfare*, 92d Cong., 1st Sess. (Pt. 1) (1971) (*FLSA Hearings (1971)*); *Fair Labor Standards Amendments of 1973: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Pub. Welfare*, 93d Cong., 1st Sess. (Pt. 2) (1973) (*FLSA Hearings (1973)*).

[20] *FLSA Hearings (1971)* 292-293 (Judith A. Lonnquist, National Organization for Women).

[21] See *FLSA Hearings (1971)* 288-289 (Lucille Shriver, National Federation of Business and Professional Women's Clubs) (expressing the view that extending Title VII would not be sufficient); *FLSA Hearings (1973)* 46a (National Federation of Business and Professional Women's Clubs) (FLSA coverage of state employers "is sorely needed").

[22] See *FLSA Hearings (1971)* 321 (Dr. Bernice Sandler) ("Salary differences between men and women doing the same work and with the same title are the rule, rather than the exception in

in particular, paid women less than men for the same work.[23] Witnesses also testified that public elementary and secondary schools[24] did not pay women equally with their male counterparts for equal work.[25]

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universities and colleges."); *id.* at 350 (article by Dr. Alan Bayer and Dr. Helen Astin) ("Across all work settings, fields, and ranks, women experience a significantly lower average academic income than do men in the academic teaching labor force for the same amount of time."); *id.* at 363 (Helen Bain, National Education Association) ("At the college level women faculty members, almost without exception, receive, on the average, substantially less for the same work than do their male counterparts."); *id.* at 748 (Jean Ross) (although "nationally, women comprise about 22 percent of the faculty at all ranks in higher education in the United States," "women are not filling a comparable proportion of the higher paying posts in higher education in either faculty or administrative positions").

[23] See *FLSA Hearings (1971)* 322-324 (Dr. Bernice Sandler) (reporting on evidence from University of Arizona, University of Minnesota, Kansas State Teachers College, University of Pittsburgh, Michigan State University, and University of California at Berkeley that "[w]omen are simply paid less than their male counterparts"); *id.* at 747 (Jean Ross) (University of Minnesota); *FLSA Hearings (1970)* 477-478 (Wilma Scott Heide, National Organization for Women) (University of Minnesota, State University of New York at Buffalo, University of Maryland, and University of Pittsburgh); *id.* at 558 (Salary Study at Kansas State Teachers College).

[24] Although school districts are generally not "arms of the state" protected by the Eleventh Amendment, see *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 280-281 (1977), there are some significant exceptions to this rule. See *Belanger* v. *Madera Unified Sch. Dist.*, 963 F.2d 248 (9th Cir. 1992) (California school districts are protected by Eleventh Amendment), cert. denied, 507 U.S. 919 (1993); *Rosenfeld* v. *Montgomery County Pub. Schs.*, 41 F. Supp. 2d 581 (D. Md. 1999) (Maryland school districts are protected by Eleventh Amendment). The law in other States remains in flux. See, *e.g.*, *Martinez* v. *Board of Educ. of Taos Mun. Sch. Dist.*, 748 F.2d 1393 (1984) (New Mexico school districts are

Thus, whether one focuses solely on the hearings concerning the Equal Pay Act extension or on the record more broadly, the existence of a pattern of unconstitutional discrimination against women by States was well established.

d. That record is further bolstered by the "extensive litigation and discussion of the constitutional violations" in the federal courts. See *Garrett*, 531 U.S. at 376 (Kennedy, J., concurring). This Court has repeatedly invalidated state laws and practices that invidiously discriminated on the basis of sex.[26] In addition, the

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protected by Eleventh Amendment), overruled by *Duke* v. *Grady Mun. Schs.*, 127 F.3d 972 (10th Cir. 1997); *Harris* v. *Tooele County Sch. Dist.*, 471 F.2d 218 (1973) (Utah school districts are protected by Eleventh Amendment), overruled by *Ambus* v. *Granite Bd. of Educ.*, 995 F.2d 992 (10th Cir. 1993) (en banc). Given that some school districts are "beneficiaries of the Eleventh Amendment," the evidence before Congress regarding the treatment of women in public schools is relevant in assessing the legislative record. See *Garrett*, 531 U.S. at 369.

[25] See *FLSA Hearings (1971)* 317 (Dr. Ann Scott) ("discrimination of salaries paid to woman teachers pervades the entire public school system"); see also *Equal Rights (1971)* 548 (Citizen's Advisory Council on the Status of Women) ("numerous distinctions based on sex still exist in the law" including "[d]ual pay schedules for men and women public school teachers"); *Equal Employment (Senate 1971)* 433 (Mary Jean Collins-Robson, National Organization for Women) ("For example, in Salina, Kansas, the salary schedule provides $250 extra for male teachers; in Biloxi, Mississippi, men receive an additional $200."); *Unemployment and Discrimination* 221 (Mary King, school board member) ("The cleaning men and cleaning women in the Euclid schools do almost the same work, although there are slightly different job descriptions. The women earn $2,500 less per year than the men.").

[26] See, *e.g.*, *Virginia*, *supra* (higher education); *J.E.B.*, *supra* (jury peremptory challenges); *Kirchberg* v. *Feenstra*, 450 U.S. 455 (1981) (property disposition); *Stanton* v. *Stanton*, 421 U.S. 7 (1975)

lower federal courts continue to find that States discriminate against women in employment in violation of both the Equal Protection Clause and the disparate treatment provisions of Title VII.[27] Those cases provide "confirming judicial documentation," *ibid.*, of unconstitutional state sex discrimination.

3. *The congruence and proportionality of the remedy to the constitutional violation*: The Equal Pay Act is a narrowly tailored response to a documented pattern of unconstitutional state discrimination in the wages paid female workers. See *County of Washington* v. *Gunther*, 452 U.S. 161, 170 (1981) (observing that Congress sought "to confine the application of the [Equal Pay] Act to wage differentials attributable to sex discrimination"). The Equal Pay Act prohibits employers from paying workers of one sex more than workers of the opposite sex for performing "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." 29 U.S.C. 206(d)(1); see *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 195 (1974). The Constitution itself forbids such disparities if they result from intentional discrimination on the basis of sex.

(child support); *Taylor* v. *Louisiana*, 419 U.S. 522 (1975) (jury service); *Reed* v. *Reed*, 404 U.S. 71 (1971) (estate administration).

[27] See, *e.g.*, *White* v. *New Hampshire Dep't of Corrs.*, 221 F.3d 254 (1st Cir. 2000); *Thomas* v. *Texas Dep't of Criminal Justice*, 220 F.3d 389 (5th Cir. 2000); *Lathem* v. *Department of Children and Youth Servs.*, 172 F.3d 786 (11th Cir. 1999); *Nicks* v. *Missouri*, 67 F.3d 699 (8th Cir. 1995); *Cross* v. *Alabama*, 49 F.3d 1490 (11th Cir. 1995); *Catlett* v. *Missouri Highway and Transp. Comm'n*, 828 F.2d 1260 (8th Cir. 1987), cert. denied, 485 U.S. 1021 (1988); *Craik* v. *Minnesota State Univ. Bd.*, 731 F.2d 465 (8th Cir. 1984); *Sweeney* v. *Board of Trustees of Keene State Coll.*, 604 F.2d 106 (1st Cir. 1979), cert. denied, 444 U.S. 1045 (1980).

The Equal Pay Act enforces that constitutional prohibition by shifting the evidentiary burden when a wage disparity is shown. Once an employee proves equal work and unequal pay, an employer bears the burden of persuasion (if it chooses to mount an affirmative defense) to show that the difference was based on "any other factor other than sex." 29 U.S.C. 206(d)(1)(iv); *Corning Glass Works*, 417 U.S. at 196-197. In essence, Congress has established a rebuttable presumption that unequal pay of male and female workers for equal work represents intentional sex discrimination, but permits employers to rebut that presumption by showing that the actual cause of the disparity is "any" factor other than sex.

The burden-shifting mechanism does not, as petitioner suggests (Pet. 15-16), render the Equal Pay Act an impermissible exercise of Congress's power under Section 5. That mechanism, which serves to ensure that cases of intentional unconstitutional sex discrimination do not evade judicial detection and remedy, is well within Congress's authority to enact prophylactic and remedial legislation to enforce the Fourteenth Amendment. This Court itself has created burden-shifting mechanisms for the same purpose of discovering discriminatory motives that can easily be concealed. See, *e.g.*, *Texas Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248 (1981) (burden shifting for claims of sex discrimination under Title VII). Moreover, this Court has recognized that "Congress can prohibit laws with discriminatory effects in order to prevent racial discrimination in violation of the Equal Protection Clause." *Boerne*, 521 U.S. at 529 (citing cases); see *South Carolina* v. *Katzenbach*, 383 U.S. 301, 325-337 (1966) (upholding constitutionality of Section 5 of Voting Rights Act, 42 U.S.C. 1973c, which prohibits

covered jurisdictions from implementing any electoral change that is discriminatory in effect, even if no discriminatory intent is shown); see also *Garrett*, 531 U.S. at 373-374 (discussing *South Carolina* v. *Katzenbach* with approval); *Lopez* v. *Monterey County*, 525 U.S. 266, 283 (1999). Here, Congress did not impose an effects test, but simply shifted the burden to the State to prove a non-discriminatory reason for a wage disparity between men and women doing the same job. Given the "wide latitude" to which Congress is entitled in exercising its comprehensive remedial power under Section 5, *Florida Prepaid*, 527 U.S. at 639 (quoting *Boerne*, 521 U.S. at 519-520), the Equal Pay Act's scheme to detect and deter sex discrimination in wages is an appropriate exercise of Congress's Section 5 authority.

Nor was Congress required, as petitioner asserts (Pet. 17), to apply the Equal Pay Act only to those States identified as most likely to engage in sex discrimination in employment. This Court has not required Congress to enforce the Fourteenth Amendment on a state-by-state basis. It is true that the Court has observed that the geographic restrictions in certain provisions of the Voting Rights Act serve to assure that those provisions are congruent and proportional to the constitutional problems that they address. See, *e.g.*, *Boerne*, 521 U.S. at 532-533. The Court has also made clear, however, that Section 5 legislation does not require "geographic restrictions, or egregious predicates." *Ibid.* In fact, this Court has repeatedly upheld other provisions of the Voting Rights Act that apply nationwide as valid Section 5 legislation. See *Oregon* v. *Mitchell*, 400 U.S. 112, 118 (1970) (nationwide ban on literacy tests); *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966) (nationwide ban on English literacy require-

ments). Singling out particular jurisdictions for individualized prohibitions, while sometimes justifiable, is highly unusual, administratively difficult, and disruptive of comity. See *Katzenbach*, 383 U.S. at 328-329. Here, moreover, the record before Congress indicated that the constitutional problem was not limited to a few States or to a single region. See, *e.g.*, pp. 16-23, 24-25 notes 9-10, 12-15, 17, 22-23, *supra*. Finally, the difficulties in proving discriminatory intent that Congress sought to address through the burden-shifting scheme of the Equal Pay Act arise in every case, regardless of jurisdiction. Congress was entitled to conclude that effective enforcement of the Equal Protection Clause is important in all jurisdictions, even in those where violations might be less frequent.[28]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[28] Petitioner also contends (Pet. 21-22) that, as a matter of law, a university should be able to defeat a Title VII claim of pay disparity by establishing that the reason for the disparity is the need to pay a sufficient salary to attract a new faculty member. The United States intervened in this case solely to address petitioner's Eleventh Amendment challenge to the Equal Pay Act and, consequently, does not address that second question.

Supreme Court, U.S.
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No. 02-253

In the Supreme Court of the United States

THE UNIVERSITY OF TEXAS HEALTH SCIENCE CENTER AT SAN ANTONIO,
Petitioner,

v.

THERESA M. SILER-KHODR,
Respondent,

AND

THE UNITED STATES OF AMERICA,
Intervenor-Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION

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ARGUMENT

I. THE COURT SHOULD RESOLVE THE CIRCUIT SPLIT REGARDING WHETHER SEX DISCRIMINATION LEGISLATION IS EXEMPT FROM THE COURT'S STANDARD §5 ANALYSIS.

Dr. Siler-Khodr incorrectly argues that there is no circuit split presented for the Court's review regarding the circuit courts' application of the §5 analysis to the EPA because the cases evidencing the conflicting §5 analysis were decided under the FMLA. She then observes that the EPA may affect a valid abrogation of the states' Eleventh Amendment immunity even if other statutes, like the FMLA, do not. Resp., at 12-13.

Dr. Siler-Khodr misses the point. The University does not contend that there is a circuit split regarding the §5 analysis of the EPA *simply because* there is a circuit split regarding the validity of the FMLA abrogation. Rather, this split evidences the circuit courts' inconsistent application of the §5 analysis in sex-discrimination legislation. The point the University is making is that the two statutes should not be treated differently. The First, Second, Third, Fourth, Fifth, Sixth, Eighth, and Eleventh Circuits have stuck down the FMLA abrogation because Congress failed to make specific findings of wide-spread unconstitutional sex discrimination by the states, while the Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits have upheld the EPA, excusing the lack of any specific findings by simply citing to an unspecified historical record of sex discrimination.[1] The split of authority demonstrates

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1. For cases striking down the FMLA abrogation, see *Laro v. New Hampshire*, 259 F.3d 1 (CA1 2001); *Lizzi v. Alexander*, 255 F.3d 128 (CA4 2001), *cert. denied*, 122 S.Ct. 812 (2002); *Townsel v. Missouri*, 233 F.3d 1094 (CA8 2000); *Chittister v. Dep't of Cmty. Econ. Dev.*, 226 F.3d 223 (CA3 2000); *Kazmier v. Widmann*, 225 F.3d 519 (CA5 2000); *Sims v. Univ. of Cincinnati*, 219 F.3d 559 (CA6 2000); *Hale v. Mann*, 219 F.3d 61 (CA2 2000); *Garrett v. Univ. of Ala. Bd. of Tr.*, 193 F.3d 1214 (CA11 1999), *rev'd on other grounds*, 531 U.S. 356 (2001). For cases upholding the EPA abrogation, see *Cherry v. Univ. of Wis. Sys. Bd. of Regents*, 265

the untenable situation of the alleged EPA abrogation being upheld based on the "mere specter of sex discrimination,"[2] while, at the same time, the FMLA abrogation is struck down because Congress failed to make specific findings of sex-discrimination by the states. Thus, in the area of sex discrimination legislation, the circuits are in disarray concerning the application of the Court's well-established §5 abrogation analysis.

Because of the importance of the states' Eleventh Amendment immunity to our system of federalism, the Court should grant the University's petition to resolve the question whether the EPA is a valid abrogation of that immunity. Alternatively, the Court should hold the petition pending its resolution of *Hibbs v. Department of Human Resources*, 273 F.3d 844 (CA 9 2001), *cert. granted*, 122 S.Ct. 2618 (2002), because the Court's resolution of the abrogation issue under the FMLA may be determinative of the question presented in this case.

II. No Obstacles Impede the Court's Review of the Questions Presented.

Dr. Siler-Khodr incorrectly contends that the Court cannot reach the Eleventh Amendment immunity questions presented without first determining whether the University has waived its immunity. Citing *Lapides v. Board of Regents*, 122 S.Ct. 1640 (2002), she argues that the University waived its immunity by removing this case to federal court and litigating the case on the merits. Resp., at 7-8.

F.3d 541 (CA7 2001); *Varner v. Ill. State Univ.*, 226 F.3d 927 (CA7 2000), *cert. denied*, 522 U.S. 902 (2001); *Kovacevich v. Kent State Univ.*, 224 F.3d 806 (CA6 2000); *Hundertmark v. Fla. Dep't of Transp.*, 205 F.3d 1272 (CA11 2000); *O'Sullivan v. Minnesota*, 191 F.3d 965 (CA8 1999); *Timmer v. Mich. Dep't of Commerce*, 104 F.3d 833 (CA6 1997).

2. *Kazmier*, 225 F.3d, at 526.

Dr. Siler-Khodr has waived this argument. She did not invoke, much less argue, waiver in response to the University's initial assertion of its Eleventh Amendment immunity in the court of appeals. Her argument that the University waived its Eleventh Amendment immunity by removal is being raised for the first time in this Court.

Unlike the defense of sovereign immunity—which is jurisdictional and may be raised at any time—the claim that the University waived its Eleventh Amendment immunity is an argument that must be raised in a timely fashion. Because Dr. Siler-Khodr failed to raise her waiver argument in the court of appeals, any waiver by the University has itself been waived, and the University's Eleventh Amendment immunity remains intact. *Perez v. Region 20 Educ. Serv. Ctr.*, 307 F.3d 318, 331-32 (CA5 2002); *Martinez v. Tex. Dep't of Criminal Justice*, 300 F.3d 567, 574-75 (CA5 2002); *Watters v. Wash. Metro. Area Transit Auth.*, 295 F.3d 36, 42 n.13 (CADC 2002); *Power v. Summers*, 226 F.3d 815, 819 (CA7 2000). Stated simply, Dr. Siler-Khodr has waived the waiver, if any.[3]

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3. Even had Dr. Siler-Khodr preserved the waiver issue, the University still maintains its sovereign immunity. *Lapides* establishes that removal would have waived the University's Eleventh Amendment immunity as to any state-law claims for which its immunity had been waived in state court, but not as to Dr. Siler-Khodr's EPA claim—to which the state did not consent in state court and for which Congress has not effectively abrogated the states' immunity. In *Lapides*, the Court specifically restricted its waiver-by-removal holding to "state-law claims, in respect to which the State has explicitly waived immunity from state-court proceedings." *Lapides*, 122 S.Ct., at 1643. The Court did not "address the scope of the waiver by removal in a situation where the State's underlying sovereign immunity has not been waived or abrogated in state court." *Id.* Therefore, there is no waiver by removal under *Lapides* as to Dr. Siler-Khodr's EPA claim, and the University's Eleventh Amendment immunity would remain intact for purposes of that claim.

Additionally, the Court should decline to consider Dr. Siler-Khodr's waiver argument because it introduces an argument that the lower court did not have the opportunity to pass upon. *See, e.g., Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 379 n.5 (1996). Dr. Siler-Khodr could have made the waiver argument in her briefing to the Fifth Circuit. But she did not. Accordingly, the Court should follow its practice of not considering issues that were not "pressed or passed upon below" and decline to entertain Dr. Siler-Khodr's waiver argument. *Duigan v. United States*, 274 U.S. 195, 200 (1927); *see also, e.g., United States v. United Foods, Inc.*, 533 U.S. 405, 416-17 (2001).

III. THE FIFTH CIRCUIT'S OPINION RUNS AFOUL OF THE COURT'S ELEVENTH AMENDMENT JURISPRUDENCE AND MERITS CONSIDERATION BY THE COURT.

A. The EPA Abrogation Is Invalid and Does Not Subject the States to Suit in Federal Court.

The Court has held, in no uncertain terms, that Congress has no authority to subject the states to suit under its Commerce Clause power, but may only do so by enacting appropriate legislation under §5 of the Fourteenth Amendment. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savs. Bank*, 527 U.S. 627, 636 (1999); *Seminole Tribe v. Florida*, 517 U.S. 44, 59 (1996). Because Congress enacted and applied the EPA to the states under the Commerce Clause, Congress's attempted abrogation of the states' Eleventh Amendment immunity is invalid.

Despite the Court's clear directive that Congress may not rely on the Commerce Clause as authority for abrogating the states' Eleventh Amendment immunity, or perhaps because of that directive, the United States insists that the EPA abrogation can be upheld as a valid exercise of Congress's §5 power under the general proposition that Congress is not required to specify the source of its

power when enacting legislation. U.S. Resp., at 5-9 (citing *EEOC v. Wyoming*, 460 U.S. 226, 243 n.18 (1983)). Thus, the United States is arguing that the Court should uphold the EPA abrogation as proper §5 legislation because Congress *could have* passed the EPA under its §5 power, even though it did not.

The United States' position is flawed for two reasons. *First*, although Congress need not explicitly invoke §5 in the text of a statute, there still must be at least some indication that Congress sought to use its §5 power. *Siler-Khodr v. Univ. of Tex. Health Sci. Ctr. at San Antonio*, 292 F.3d 221, 223 (CA5 2002) (Smith, J., dissenting from denial of petition for panel rehearing). As the Court noted in *Raygor v. Regents of the University of Minnesota*, "[w]hen Congress intends to alter the usual balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute" to ensure that "the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision" of an important question of constitutional law. 534 U.S. 533, 543-44 (2002). *See also Fla. Prepaid*, 527 U.S., at 642 n.7 (refusing to consider the Just Compensation Clause as justification for the attempted abrogation because Congress had expressly identified the powers it believed itself to be acting under—the Commerce Clause and §5 of the Fourteenth Amendment—and because "[t]here [wa]s no suggestion in the language of the statute itself, or in the House or Senate Reports of the bill which became the statute that Congress" intended to implement its Just Compensation Clause power). Because Congress gave no indication in 1974 that it was applying the EPA to the states under its §5 power, the Court should not lightly "attribute to Congress an intent to intrude on state governmental functions" under that power. *Raygor*, 534 U.S., at 546 (citing *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991)).

Second, the United States' suggestion that the EPA abrogation can be upheld as valid §5 legislation should be rejected because Congress plainly identified the Commerce Clause as the purported

source of its power to abrogate the states' Eleventh Amendment immunity. *See* H.R. REP. NO. 93-913, at 1-2 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811, 2811-12. The 1974 House and Senate Reports confirm that in applying the EPA to the states, Congress intended to act solely under its Commerce Clause power. The fact that it is now clear that Congress had no power to do so should not send the Court "rummag[ing] through the Constitution" in search of a power that may support Congress's action after the fact. *Timmer*, 104 F.3d, at 846 (Boggs, J., dissenting in part).[4] The Court should not "rewrite the statutory scheme in order to approximate what Congress might have wanted had it known that [applying the EPA to the States under its Commerce Clause power] was beyond its authority." *Seminole Tribe*, 517 U.S., at 76.

B. Assuming, *Arguendo*, That the EPA May Be Viewed as §5 Legislation, It Is Nonetheless Infirm Because It Erects a Standard That Exceeds the Protection Afforded by the Constitution, and It Was Applied to the States With No Supporting Congressional Findings of Widespread Unconstitutional Behavior by the States.

The EPA abrogation cannot withstand the Court's §5 congruence-and-proportionality test. The statute drastically alters the applicable equal-protection standard by allowing a finding of discrimination against the states in the absence of any evidence of intent to discriminate. And Congress subjected the states to this heightened standard without first making the requisite findings of widespread and persistent unconstitutional state action to support that measure. Thus, a straight-forward application of the §5 test demands the EPA abrogation be stricken.

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4. Justice Boggs dissented in part from the majority in *Timmer* because he, like Justices Smith and DeMoss in this case, believed that Congress applied the EPA to the states under its Commerce Clause power, not §5. *Timmer*, 104 F.3d, at 845-47; *Siler-Khodr*, 292 F.3d, at 222-24.

The United States attempts to justify Congress's attempt to subject the states to suit under the EPA by arguing that our nation's history of sex discrimination—as noted in *United States v. Virginia*, 518 U.S. 515 (1996)—can substitute for the required congressional findings of a "pattern of unconstitutional discrimination on which §5 legislation must be based." *Bd. of Tr. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 370 (2001); U.S. Resp., at 12-15. The Court, however, has never suggested that historical discrimination *in general* will permit the abrogation of the states' Eleventh Amendment immunity. Even in cases dealing with race discrimination, the Court has unfailingly applied its §5 analysis, with no leniency offered as to the findings requirement. *See, e.g., South Carolina v. Katzenbach*, 383 U.S. 301, 328-31 (1966).

Moreover, the United States' reference to *testimony* heard by Congress in the years before the application of the EPA to the states cannot substitute for congressional *findings* of widespread intentional sex discrimination by the states. U.S. Resp., at 15-25. The vast majority of the testimony cited by the United States was not about extending the EPA to the states, but instead, dealt with other bills and was heard in different legislative sessions by different members of Congress. Further, the scant evidence of sex discrimination by states that was heard in connection with the 1974 extension of the EPA to the states is insufficient to show a pattern of sex discrimination by the states. Rather, the evidence "consists almost entirely of isolated sentences clipped from" legislative hearings and reports. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 89 (2000).

For the purposes of justifying the abrogation of the states' Eleventh Amendment immunity under the EPA, this scant and remote testimony will not suffice. There is absolutely no evidence that in 1974 the states were engaging in such rampant and widespread unconstitutional sex discrimination that the application of the EPA, which redefines the contours of the Constitution to

prohibit state action in the absence of any evidence of intentional discrimination, was necessary.

The remedy provided by the EPA is, therefore, incongruent and out of proportion to the supposed harm it was designed to prevent. This congressional expansion of rights is substantive in operation and effect and constitutes an invalid attempt by Congress to abrogate the states' Eleventh Amendment immunity.

CONCLUSION

The Court should grant the petition for writ of certiorari.

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